

B70.1 - B104

1 Q. Would you tell the jury what an MVR tape is, or was?

2 A. It was a tape recorder that was set up in the police

3 car that was made to activate when the officers activated

4 their emergency equipment. It was tied to a camera. It was

5 face-forward. And it would record audio and visual

6 encounters that the police would have on car stops and

7 things of that nature.

8 Q. What sort of things would activate this video

9 recorder?

10 A. I believe the officers could turn it on manually, or

11 if they turned on the emergency lights, the 360s on the

12 police vehicle, it would activate automatically.

13 Q. Does the Wilmington Police Department still use MVRs?

14 A. No, we don't.

15 Q. Why not?

16 A. There was a lot of problems with them. They weren't

17 reliable.

18 MR. PARKINS: Your Honor, I would like to show

19 to the jury the MVR tape that was recovered by the

20 Detective.

21 THE COURT: That is fine.

22 MR. PARKINS: Can we use, Ms. Sulton, your video

23 machine?

24 MS. SULTON: Of course.

25 MR. PARKINS: Thank you.

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1 THE COURT: That's the Court's video machine.

2 MS. SULTON: Excuse me, Your Honor.

3 THE COURT: You brought one, too. Okay.

4 BY MR. PARKINS:

5 Q. Can you see it from there, Lieutenant?

6 A. Yes.

7 (Tape turned on.)

8 MR. PARKINS: Can you fast-forward this, Mr.

9 White?

10 BY MR. PARKINS:

11 Q. Lieutenant, did the video which you observed have

12 images on it?

13 A. I am sorry?

14 Q. Did the video which you observed, the MVR video, have

15 images on it?

16 A. Yes, it had some images on it. None of the 13th.

17 Q. Can you see the date of the video here, was it 9/10?

18 A. Yes, it's 9/10/03.

19 Q. Would this have been taken from Patrol Car 1180?

20 A. Yes.

21 Q. By the way, the tape itself is in a case locked, it's

22 in the trunk?

23 A. Yes, it is. It is in a secure vault in the trunk, the

24 recording unit, which is locked. The officers that are

25 driving the cars don't have access to it.

1 MR. PARKINS: Mr. White, can we maybe proceed,

2 fast-forward for a little bit now.

3 Mr. White, can you go at a normal speed for a

4 second to see if there are any images here.

5 Go fast-forward to another image.

6 BY MR. PARKINS:

7 Q. Is this what you would expect to see on a properly

8 functioning MVR?

9 A. No. It should turn on and off when it is activated.

10 You have got audio and video.

11 MR. PARKINS: Is this now normal speed?

12 MR. WHITE: Yes.

13 MR. PARKINS: Mr. White, if you can fast-forward

14 to the last image.

15 BY MR. PARKINS:

16 Q. All right. Now, this is 9/11.

17 MS. SULTON: Your Honor, may we have a sidebar?

18 THE COURT: Yes.

19 (The following took place at sidebar.)

20 MS. SULTON: I don't think that Mr. Parkins is

21 qualified to enter evidence about the sequencing of the

22 dates on the videotape. I think we need to have someone wh

23 is familiar with this particular tape, the maintenance of

24 the machine, and so forth.

25 It is a major contention in our -- not a major

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1 contention. But it is a contention of our case that this

2 tape did not record the incident. There are no reports of

3 which we are aware that indicate this machine was not

4 properly working. And I am very concerned about Mr. Parkins

5 offering testimony that, well, it wasn't working for a

6 couple days before and nobody knew it.

7 THE COURT: Are you just now objecting to it?

8 MS. SULTON: I didn't know he was going to do

9 it.

10 THE COURT: He has been doing it for ten minutes

11 or thereabouts.

12 MR. PARKINS: The point is, this is the tape

13 that came out of the car. It is the best evidence there is.

14 THE COURT: You are not the best proponent of

15 this evidence, is her objection. In effect, you are. That

16 has finally drawn an objection.

17 MR. PARKINS: I am sorry. I will ask the

18 witness the dates on the machine. What happens is the

19 sequence of dates on this particular tape is I think

20 September 10th, it goes to the 11th, then it goes back to

21 September 9th is the next in the sequence. And this witness

22 will testify that what happens is when it goes through, and

23 if it is not removed, it automatically rewinds. So it was

24 in the car on September 8th, September 9th, and then it

25 rewound and it went up again to September 11. And then it

1 stopped working. And it would have been impossible to have
 2 erased --
 3 THE COURT: You know all that because he has
 4 investigated? Is he qualified?
 5 MR. PARKINS: Yes. He is the one that
 6 investigated this. He was the chief investigator for this.
 7 MS. SULTON: Your Honor, I think that if he lays
 8 the proper foundation that this witness has personal
 9 knowledge that that's what happened, then I think that's
 10 fine. But I haven't seen any -- there was no disclosure to
 11 me that this particular gentleman had information, that kind
 12 of information about this videotape.
 13 THE COURT: I thought there was a discussion
 14 between counsel about the videotape. This is not the
 15 videotape?
 16 MR. PARKINS: No. I think that was the video
 17 deposition.
 18 MS. SULTON: I didn't know --
 19 THE COURT: Have counsel previously discussed
 20 this issue?
 21 MS. SULTON: No. I didn't know he was going to
 22 use it like this.
 23 THE COURT: Okay.
 24 MS. SULTON: If he has a witness --
 25 THE COURT: Who maintains custody and control

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1 over these videotapes?
 2 MR. PARKINS: He had custody.
 3 THE COURT: Who is the IT person who does?
 4 MR. PARKINS: Because this is evidence, it got
 5 locked away.
 6 THE COURT: Whose function is it at Wilmington
 7 Department of Police to work with these videos, to bring
 8 them in and out of the car, install them, reinstall them,
 9 that kind of thing?
 10 MR. PARKINS: No one now, of course, because
 11 they don't use them. It was not this witness. He didn't do
 12 that in 2003, except he did in this case.
 13 THE COURT: Essentially, there is a hearsay
 14 problem, also, with regard to the result of his
 15 investigation, because he is going to say what others told
 16 him. You are offering these things for the truth of the
 17 matter?
 18 MR. PARKINS: Can I just introduce the tape.
 19 The tape is a tape. It speaks for itself.
 20 MS. SULTON: I believe the tape is in.
 21 THE COURT: There was no objection to the tape?
 22 MS. SULTON: No, sir.
 23 THE COURT: I do think the tape speaks for
 24 itself. If the jury wants to view it --
 25 MR. PARKINS: Is it fair to ask him what dates

1 did he observe on the date where it was --

2 THE COURT: Sure. If he observed the date,
 3 sure, yes.
 4 MR. PARKINS: Okay.
 5 THE COURT: He went through the tape.
 6 MS. SULTON: Well, Your Honor, I think that he
 7 would be able to say that when he looked at the tape he saw
 8 some date stamps. Is that what you are talking about?
 9 THE COURT: He can say what he saw on the tape
 10 based on his observations. Can we expedite this in some
 11 way?
 12 MR. PARKINS: I am going to move on.
 13 (End of sidebar conference.)
 14 THE COURT: Mr. White, you can turn that off.
 15 BY MR. PARKINS:
 16 Q. Detective, can you tell the jury the dates that you
 17 saw on this tape and the order in which those dates
 18 appeared?
 19 A. I believe the dates on this tape were 10, 11, 12 and a
 20 nine, something like that. But they were out of sequence.
 21 Q. Was there --
 22 A. I believe it was 10, 11, 12, and then it went back to
 23 9.
 24 Q. Was there any footage for September 13?
 25 A. No, there wasn't.

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1 Q. All right.
 2 Detective, I want to ask you about interviews.
 3 One of the interviews that you conducted was of Mr. Smith.
 4 Am I correct?
 5 A. Yes.
 6 Q. And when was that interview conducted?
 7 A. It was conducted later that night, on the 13th.
 8 Q. Mr. White, can you play Mr. Smith's interview, the
 9 second one that we have?
 10 (Tape played.)
 11 BY MR. PARSONS:
 12 Q. You gave your card that night to Mr. Smith?
 13 A. Yes, I did.
 14 Q. Did any of the Smiths ever contact you to find out
 15 what was happening?
 16 A. No.
 17 Q. Have you received training in the use of deadly force?
 18 A. Yes, I have.
 19 Q. Based upon what you saw that night, do you think tha
 20 the officers' use of deadly force was necessary?
 21 A. Yes, it was.
 22 Q. Why?
 23 A. Well, I believe we had that night, what I believe is
 24 that we had a dangerous subject who posed a serious threa
 25 an imminent threat of serious physical injury or death

B-070.2

IN AND FOR THE DISTRICT OF DELAWARE

— — —

Plaintiffs,

v.

Defendants.

No. 04-1254-GMS

Year	Index	Value
1990	100	100
1991	100	100
1992	100	100
1993	100	100
1994	100	100
1995	100	100
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FIFTH DAY OF TRIAL

1 of 50 chs

1 APPEARANCES:

2 KESTER I.H. CROSSE, ESQ.

-and-

3 ANNE T. SULTON, ESQ.

(Olympia, WA)

4

Counsel for Plaintiffs

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JOHN A. PARKINS, ESQ., and

6 STEVEN J. FINEMAN, ESQ.

Richards, Layton & Finger

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Counsel for Defendants

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THE COURT: Good morning.

10 May I see counsel.

11 (The following took place at sidebar.)

12 THE COURT: Unfortunately, the Court has had to
13 spend its time looking at this late-filed motion yesterday
14 afternoon with regard to the defendants' desires to have
15 admitted pursuant to 803(8)(C) a report entitled Report of
16 Attorney General, Wilmington Police Department, Shooting
17 September 13, 2003.

18 I take it there has previously been an objection
19 interposed to the admission of this report. Is that
20 correct?

21 MS. SULTON: That's correct.

22 THE COURT: Why didn't this matter come up
23 during the pretrial conference when I asked whether there
24 were additional matters? This is a significant issue, and I

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1 spent an hour and a half looking at cases and analyzing your
2 memorandum this morning.

3 MR. PARKINS: I am sorry, Your Honor. At the
4 time of the pretrial conference, I tried to cover the
5 issues. There were lots of objections.

6 THE COURT: This strikes me that it should have
7 been the subject of a motion in limine one way or the other,
8 perhaps by both.

9 MR. PARKINS: I understand that. In retrospect,
10 I apologize for the Court's time.

11 MS. SULTON: Your Honor, I received his motion
12 at the same time you received it.

13 THE COURT: No. You received notice much
14 earlier that he wanted to use two reports, the Attorney
15 General's report and, as I understood it from yesterday, Mr.
16 Parkins, you told me the City Solicitor's report. You have
17 since have withdrawn that request.

18 MR. PARKINS: Yes. Last night Ms. Sulton and I
19 spoke, and I told her I would withdraw that request.

20 MS. SULTON: When I spoke with him last evening,
21 I told him I might not --

22 THE COURT: I don't want to spend any more time.

23 I am just chastising the two of you.

24 What I am interested in is your position on this

25 Attorney General's report.

1 MS. SULTON: I haven't yet made a decision. I

2 was hoping Mr. Parkins had conveyed to the Court that since
3 we are going to spend two hours watching the video --

4 THE COURT: I thought this was an hour-and-
5 change.

6 MR. PARKINS: Hour and 45 minutes, or an hour
7 and a half. My direct is 40 minutes long, I think.

8 THE COURT: This is your police use of force
9 expert?

10 MR. PARKINS: Yes.

11 MS. SULTON: And I was going to read it then,
12 because I might not have an objection to it at this point
13 given the state of the evidence, Your Honor. And I told Mr.
14 Parkins that yesterday and asked him to convey it to you
15 this morning.

16 THE COURT: Mr. Crosse, make sure you read this
17 report.

18 MR. PARKINS: I misspoke. It is not the use of
19 force expert. It is the forensic expert.

20 THE COURT: Take some time, counsel. You read
21 the report. You let me know if you want to maintain an
22 objection to it. I have looked at the law. I have looked
23 at the report. I, quite frankly, think it is irrelevant. I
24 will give Mr. Parkins a chance to tell me why it is
25 relevant. But I think you are swimming decidedly upstream

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1 on this one, Mr. Parkins. That is just the first problem
2 that this report has. If there is no objection...

3 MR. CROSSE: Your Honor, I am pretty sure we
4 would object. The ultimate result is to clear the
5 defendants in this case.

6 THE COURT: Let's take a few moments here and
7 talk about this report.

8 This is from the report itself language. I am
9 reading at Page 2. Do you want to get your copy?

10 MR. PARKINS: Yes, sir.

11 THE COURT: Just looking, Mr. Parkins, and
12 counsel, at Page 2, under Purpose of the Attorney General's
13 Report, we find the third sentence in that first paragraph,
14 "The Attorney General does not establish or enforce internal
15 policies concerning the proper use of deadly force by police
16 officers."

17 At the last paragraph, on Page 6, "Based on the
18 above investigation, the Office of the Attorney General
19 concludes that the use of deadly force by members of the
20 Police Department was justified as outlined in 11 Del. Code.
21 The purpose of this investigation, as stated, was to
22 determine whether a crime had been committed."

23 What does that have to do with the civil
24 liability of these officers?

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25 MR. PARKINS: Because they have a claim under 1

1 Del. Code.
 2 THE COURT: No. Explain. Elaborate.
 3 MR. PARKINS: I think it's alleged in the
 4 complaint that they base a claim on 11 Del. Code.
 5 THE COURT: The complainant does.
 6 MR. PARKINS: Yes.
 7 THE COURT: Let me see that. There are other
 8 hurdles you are going to have to mount. I want to talk
 9 about relevance.
 10 He is saying the complaint in point of fact
 11 recites a violation in one of its paragraphs as the basis
 12 for the relief you are seeking on behalf of your clients,
 13 that there was a violation of Delaware criminal law.
 14 MS. SULTON: I don't believe so. Delaware
 15 constitutional law.
 16 THE COURT: You are saying 467.
 17 MS. SULTON: I don't believe I was that
 18 specific, Your Honor.
 19 MR. PARKINS: If they are not basing a claim on
 20 Section 467, then I will withdraw the request.
 21 THE COURT: Do you want to go back and look? I
 22 will permit an amendment of the complaint right here. I
 23 won't let you argue that to the jury, if that is your
 24 position. Do you want to reexamine?
 25 This is completely different. This report is

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1 rife with other examples of why I believe it would be, it's
 2 not relevant, and it would be problematic for other reasons.
 3 I think it would confuse the jury. There are two different
 4 standards.
 5 Let's talk about one problem that I see. I will
 6 reference you to the page. Page 3, under Conclusion. The
 7 first paragraph. Last sentence. "Under Delaware law, it is
 8 the subjective state of mind of Detective John Ciritella
 9 which is of critical importance in determining whether his
 10 use of deadly force was justifiable in the case."
 11 Subjective state of mind doesn't have anything
 12 to do with the 1983 inquiry of the officers, I think we can
 13 agree.
 14 MR. PARKINS: Agree.
 15 THE COURT: I have concern that might confuse
 16 the jury as to what standard are they to apply. What are
 17 they supposed to do, use the officer's subjective or
 18 objective state of mind? Admittedly, insofar as the
 19 wrongful death claim is concerned, there is an element of
 20 state of mind there. For purposes of the 383 inquiry, I am
 21 concerned about that.
 22 MR. PARKINS: I agree that the states of mind
 23 are different. Again, this was based on my understanding
 24 that there was a claim based on the statute.
 25 THE COURT: I am hearing you. So do you want,

1 while the videotape is being viewed by the jury, counsel for
 2 plaintiff, take a look more thoroughly at the report, back
 3 at your complaint, then we can reconvene before this matter
 4 becomes ready to be discussed further.
 5 MR. PARKINS: As far as I am concerned, I don't
 6 intend to use this today. It is something we could do at
 7 the end of the day.
 8 THE COURT: I am sorry. I should have asked. I
 9 assumed it was going to be used today. My assumption. You
 10 know about assumptions. I shouldn't have made that
 11 assumption. I thought it was an important enough issue that
 12 I wanted to understand the positions.
 13 MR. PARKINS: I neglected to make that clear.
 14 THE COURT: Let's get the jury in.
 15 There is an exhibit issue, I understand.
 16 MS. SULTON: Yes. I had a witness mark this --
 17 THE COURT: He didn't mark it -- you didn't have
 18 it marked as an exhibit. Is there any objection to it being
 19 marked?
 20 MR. PARKINS: No.
 21 THE COURT: Any objection to its admission?
 22 MR. PARKINS: No.
 23 THE COURT: I assume you are seeking its
 24 admission.
 25 MS. SULTON: Yes.

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1 MR. PARKINS: Your Honor, now that I think about
 2 this, there is one other question. We haven't discussed the
 3 use of voir dire to play to the jury.
 4 MR. CROSSE: She said she wasn't going to play
 5 it.
 6 THE COURT: We can resolve what number it should
 7 be given later. We are looking at the Google map of the
 8 Harrison Street area, 507 Harrison.
 9 MR. PARKINS: Can I get a copy of that?
 10 THE COURT: We don't have a color copier.
 11 MR. PARKINS: Black and white is fine.
 12 (End of sidebar conference.)
 13 (Jury enters courtroom at 9:33 a.m.)
 14 THE COURT: Good morning, members of the jury.
 15 Take your seats.
 16 We will proceed now with the defense's
 17 case-in-chief. I believe we have some video testimony.
 18 Mr. Parkins, do you want to share with the jury
 19 what they are going to be seeing?
 20 MR. PARKINS: Yes, if I may, Your Honor.
 21 Ladies and gentlemen of the jury, the defendants
 22 retained a forensic scientist as an expert witness, Dr. Jon
 23 Nordby. Dr. Nordby has an office in Tacoma, Washington. He
 24 suffers from a very serious illness which prevents him from
 25 coming to trial today. So in lieu of his live testimony, we

1 will present a videotape deposition that was taken by Ms.
2 Sulton and myself on April the 2nd of this year in his
3 office in Tacoma.

4 I believe that Judge Sleet will tell you at the
5 end of the case that his deposition testimony should be
6 considered in the same light as if it were given live in the
7 courtroom.

8 THE COURT: Right. Thank you, Mr. Parkins.

9 MR. PARKINS: Thank you, Your Honor.

10 (At this point the videotape deposition of Jon
11 J. Nordby was played.)

12 - - -

13 THE COURT: Let's take our morning break, ladies
14 and gentlemen.

15 (Jury leaves courtroom at 11:31 a.m.)

16 (Recess taken.)

17 THE COURT: How much more do you have?

18 MR. PARKINS: 33 minutes, Your Honor.

19 (Jury enters courtroom at 11:57 a.m.)

20 THE COURT: Please be seated, ladies and
21 gentlemen. I am told we have about a half an hour left.

22 (Videotape completed.)

23 THE COURT: Next witness.

24 MR. PARKINS: John Ciritella.

25 ... JOHN CIRITELLA, having been duly sworn as a

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1 witness, was examined and testified as follows ...

2 DIRECT EXAMINATION

3 BY MR. PARKINS:

4 Q. Detective, how old are you?

5 A. Forty-two.

6 Q. Where were you born?

7 A. Wilmington, Delaware.

8 Q. Tell us where you went to high school?

9 A. St. Elizabeth's High School.

10 Q. When did you graduate from high school?

11 A. 1982.

12 Q. What did you do after you graduated from high school?

13 A. Went to work at a company called Gates Engineering.

14 Q. And how long were you at Gates?

15 A. Approximately two years.

16 Q. Did you work at any other place after Gates?

17 A. St. Joe's Container Company.

18 Q. How long were you there?

19 A. Approximately two years.

20 Q. Are you employed by the Wilmington Police Department?

21 A. That is correct.

22 Q. When did you join the Police Department?

23 A. 1986.

24 Q. Did you attend a training academy when you joined the

25 Police Department?

1 A. Yes, I did.

2 Q. How long did it last?

3 A. It was about six months.

4 Q. Could you tell us a little bit about what sorts of
5 things were taught at the training academy?

6 A. The training academy lists a variety of training
7 methods, anywhere from firearms training, report-writing,
8 some constitutional law, motor vehicle violations, again,
9 laws of arrest.

10 Q. Did you receive any instruction in the academy on the
11 use of force?

12 A. Yes, I did.

13 Q. Did you use any -- specifically, did you receive any
14 training on the use of deadly force?

15 A. Yes, I did.

16 Q. Were you taught when and when it is not appropriate to
17 use that force?

18 A. I did.

19 Q. After you graduated from the academy, did you go out
20 on the street by yourself?

21 A. No, sir.

22 Q. What happened then?

23 A. Generally in Wilmington, we generally go out on a
24 probationary period. That is anywhere from 12 to 18 months.

25 Q. What does the probationary period mean?

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1 A. Generally, you are assigned to an FOT or Field
2 Training Officer and you will ride with that person.

3 Generally, for that time, you are usually assigned to
4 another person as a two-man car for again 12 to 18 months.

5 Q. Does the Wilmington Police Department provide you wit
6 periodic retraining or training?

7 A. That is correct.

8 Q. Could you tell us a little bit about the source of
9 things that you receive, training you receive from the
10 Police Department?

11 A. It generally varies. Yearly we are mandated to have X
12 amount of training of in-service hours. It could be our
13 CPR, it could be updates in memos. It could be, again, laws
14 of arrest. Certain cases dictate certain things for us.

15 Q. Are you entitled to qualify on the range, your weapon?

16 A. Yes.

17 Q. Tell us, for those of the jury who might not be
18 familiar with weapons, what does it mean to qualify?

19 A. Generally, yearly we have to qualify with our weapon,
20 which means we have to go down the range and it is required
21 it's three shoots, two daytime shoots and one nighttime
22 shoot. You have to acquire a score that qualifies you to

23 carry a firearm.

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24 Q. What happens if you fail to qualify?

25 A. You cannot go out on the street.

1 A. Yes.

2 Q. Does Wilmington Police Department have a SWAT team?

3 A. Yes, it does.

4 Q. Are you a member of that SWAT team?

5 A. Yes, I am.

6 Q. Would you please tell the ladies and gentlemen of the

7 jury when you became a member of the SWAT team and how it is

8 that you qualified to become a member?

9 A. I became a member in 1988. We currently have, I

10 believe, 20 to 30 members. Again, it depends on our

11 military leave. We have normal, I guess, actual training,

12 it comes up once a month, and it depends on that training,

13 and you have to actually yearly make X amount of training to

14 be continued for the following year via our SWAT team.

15 Q. Do you simply sign up for the SWAT team?

16 A. No. You actually have to qualify via a physical

17 fitness test and an oral board.

18 Q. Do you receive any special training as a result of

19 your membership in the SWAT team?

20 A. We probably train a little bit more, we probably train

21 more often than the general patrol officer, yes.

22 Q. I don't want to go back through your entire career.

23 But have you received any commendations, let's say since

24 2000?

25 A. I generally have unit citations within the SWAT team,

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1 Criminal Investigations Division. I have some individual

2 awards, whether it is an outstanding or a merit award. And

3 I am actually a Kiwanis Board winner for a quarter.

4 Q. Have you received any disciplinary actions, let's say

5 since 2000?

6 A. No, sir.

7 Q. Did you receive a commendation for this incident?

8 A. No, sir.

9 Q. Were you disciplined for this incident?

10 A. No, sir.

11 Q. Aside from this incident, have you ever fired your

12 weapon away from the range?

13 A. No, sir.

14 Q. Detective, what I would like to do is to begin by

15 discussion of the events of September 13. I would like to

16 make a list of what information became available to you as

17 these events unfolded. To do that, with the Court's

18 permission, I would like the Detective to help me make a

19 chart of the information and when it became available?

20 THE COURT: Okay.

21 MR. PARKINS: Thank you.

22 THE COURT: You can wait until he is set up.

23 MR. PARKINS: Your Honor, I have arbitrarily

24 divided these events into four different segments for

25 purposes of identifying when information became available to

the witness.

2 THE COURT: You might identify the segments for

3 the record, Mr. Parkins.

4 MR. PARKINS: Yes, sir. The first segment is

5 before joining the pursuit. The second segment is during

6 pursuit. The third segment is Fifth Street. And the last

7 segment is Harrison Street.

8 May I ask the witness to come down, please?

9 (Witness steps down from stand.)

10 BY MR. PARKINS:

11 Q. Let's focus on what it is that you learned before

12 joining the pursuit. Perhaps you could tell the jury what

13 you were doing when you first heard about this unfolding

14 incident.

15 A. On September 13 I was actually working my Criminal

16 Investigations Division, a 4-to-12 shift or 1600-to-2400

17 shift. I was actually at my desk doing paperwork, typing a

18 report.

19 Q. And how did you hear about this incident?

20 A. I have a handheld radio that's right next to me. And

21 I heard the call come in, it was a call for backup, which I

22 in turn took as a call for assistance because of the tone of

23 the officer's voice.

24 Q. Before you joined the pursuit, why don't we list what

25 you knew before you got into your car and joined the

711

1 pursuit?

2 A. Again, I will call it a radio call, is what I

3 received. And again, I took that as a call for assistance

4 because of his tone.

5 THE COURT: Members of the jury, can you read

6 that?

7 Okay.

8 THE WITNESS: Again, can everybody hear me okay?

9 BY MR. PARKINS:

10 Q. Yes. What else did you learn?

11 A. As soon as I heard the initial call for assistance, I

12 grabbed my radio. My car keys were right there. Because it

13 was an on-call weekend, our back parking lot to our Police

14 Department is kind of empty, so I was actually close in the

15 parking lot.

16 Again, with that call I grabbed my radio, with

17 his tone of his voice, and I went down actually two flights

18 of stairs, down into the back parking lot area.

19 Q. Did you learn anything as you were proceeding back

20 towards the back parking lot area?

21 A. As I got out to the back parking lot, I then heard a

22 "Shots fired, shots fired, police car taken."

23 Q. Would you please write on there "Shots fired"?

24 (Witness complies.)

25 Q. Did you learn anything about what happened to the

1 police car as you were proceeding down the stairs?

2 A. Again, with the "shots fired" call, the next

3 transmission was "Police car taken."

4 Q. So would you put on there something to indicate that

5 information?

6 (Witness complies.)

7 Q. And, then, did you learn anything else about this

8 event before you got into your car?

9 A. Again, as I heard this on the radio and I got in the

10 car, I then heard Sergeant Donohue that was actually

11 pursuing the vehicle.

12 Q. All right. What did you do when you got into your

13 car?

14 A. As soon as I got in my car, I believe the transmission

15 was, "Location on Washington Street," at which point -- our

16 rear lock comes out of Fourth and Poplar Street on Fourth

17 Street, is where I exited out on. Washington Street is west

18 of me. I started in a westbound direction.

19 Q. When did you first see the stolen police car?

20 A. I actually saw it at Fourth and Jefferson Streets. I

21 was traveling westbound on Fourth Street. At Jefferson

22 Street, I saw the vehicle.

23 Q. You were at Jefferson Street?

24 A. I was at Jefferson Street.

25 Q. And where was the stolen police car?

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1 A. The radio transmission at that particular time was the

2 vehicle was traveling in a southbound manner on Monroe

3 Street. And I knew that Jefferson -- I guess Monroe Street

4 is one block west. And I knew that I would intersect with

5 it as the vehicle was coming out.

6 Q. Where was the stolen police car when you first saw it?

7 A. It came out from Monroe Street onto Fourth Street

8 westbound.

9 Q. Would you describe for the ladies and gentlemen of the

10 jury the manner in which it pulled out onto Fourth Street?

11 A. When it came out on Fourth Street, again, from the

12 radio transmissions, you could see the vehicle kind of go

13 wide of that. Of course, I could see at that particular

14 time, there was actually two detective vehicles in front of

15 me, where I was situated. And as the car came out, you

16 could see another I guess it's a marked unit join the chase,

17 and there was another detective car right there.

18 Q. Was the wide turn something that was of some

19 importance or significant to you?

20 A. He turned, I would call it wide, which would be the

21 eastbound lane, he turned, and as he was approaching, the

22 next block is Adams Street. As he came to Adams Street, I

23 could then visually see, there is a red light at Adams. And

24 he continued westbound through that red light.

25 Q. Why don't we list the information you learned when you

first saw the police car on Fourth and Monroe under Pursuit?

2 A. I guess what I saw is the wide turn, I guess erratic

3 driving. Then I saw, actually, the red light both at Fourth

4 and Adams westbound and Fourth and Jackson. So he ran bot

5 of those red lights. But his manner as he came up to

6 Jackson Street, again, he couldn't get around traffic. It

7 has like a turning lane to the left. So he had to actually

8 I guess maneuver through and accelerate through Jackson

9 Street.

10 Q. So he was maneuvering around cars?

11 A. That's correct.

12 Q. Why don't you indicate that information, please.

13 (Witness complies.)

14 A. The other thing I noticed at this particular time

15 which was difficult to see is again there was enough police

16 presence there that he hadn't stopped at this particular

17 time. So from the initial chase that was given which was

18 initiated by a supervisor, at that particular time, he

19 hadn't stopped. And there was visible police presence there

20 at that time.

21 Q. So he wasn't stopping for police?

22 A. Not at that time, no.

23 Q. Could you add that to your list, please?

24 (Witness complies.)

25 Q. How many red lights did he run?

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1 A. At least two that I visually saw.

2 Q. They were at Adams and Jackson Street?

3 A. That's correct.

4 Q. For some of the jurors who may not be from Wilmington

5 could you describe the intersection of Fourth and Adams?

6 A. Fourth and Adams probably, in the City of Wilmington,

7 Fourth Street is actually, it is actually, I guess it's two

8 lanes westbound, two lanes eastbound. It is actually a

9 fairly busy street for the City of Wilmington. And I would

10 call Fourth and Adams and Fourth and Jackson a very busy

11 street, because we have I guess it is a southbound off-ramp

12 that comes off right there on Jackson Street, along with

13 Jackson that runs, I guess, parallel with it. So it is a

14 very busy intersection for us.

15 Q. Southbound off-ramp from I-95?

16 A. That's correct.

17 Q. So some of this traffic coming southbound from I-95

18 crosses Fourth and Adams? B-076

19 A. Yes.

20 Q. What about traffic trying to get on the southbound

21 lane of I-95?

22 A. Southbound actually goes down to Second and Jackson,

23 or Lancaster and Jackson.

24 Q. There are people coming down Jackson Street?

25 A. That's correct.

1 Q. And he ran the red light there?
 2 A. Yes.
 3 Q. Is Jackson Street just a one-lane road?
 4 A. No. Jackson Street is actually, if anybody has ever
 5 been off I-95, I think it is about four lanes, three lanes
 6 at least, in a southbound manner.
 7 Q. Had you heard while you were in the pursuit, had you
 8 already heard about the route that his pursuit was -- he was
 9 taking in the car?
 10 A. Yes, I did. By the time I got in my car, I knew they
 11 were westbound, then I started hearing the directions that
 12 they were in a westbound manner on Seventh Street, which is
 13 one way. Seventh Street in the City of Wilmington travels
 14 eastbound -- yes, eastbound. So he was already on that
 15 street driving. And then he went down to Monroe Street.
 16 And he started southbound on Monroe Street.
 17 Q. So he was going one way, the wrong way on Seventh
 18 Street?
 19 A. On Seventh Street.
 20 Q. Would you put that in, please, as information that you
 21 acquired?
 22 (Witness complies.)
 23 Q. What was his speed like on Fourth Street?
 24 A. I would say he was accelerating, because at that
 25 particular time, even though I had a couple cars in front of

717

1 me, I don't think any of us could really catch up to him at
 2 that particular time.
 3 Q. Could you please put that on the list of things that
 4 you learned?
 5 (Witness complies.)
 6 Q. Okay. Now, let's focus, if we could, on what happened
 7 on Fifth Street. Let's tell the jury, first, what did you
 8 do when you were following the suspect on Fourth and he
 9 turned?
 10 A. What was happening is, as he was coming up, I guess,
 11 through Fourth and Jackson, I actually had to maneuver a
 12 little bit more I guess into the eastbound lane to kind of
 13 get through traffic myself. I know for a fact, I think
 14 there was another couple cars that came from Fourth and
 15 Jackson Street that added into the chase, or the pursuit.
 16 But when we got to Fourth and Van Buren, I
 17 realized there was multiple cars that were following the
 18 stolen police car at that particular time. I decided to
 19 parallel the chase, and at least go one block to Harrison,
 20 at which point I decided to go northbound on Harrison Street
 21 in the 400 block, with the thought that if the gentleman
 22 comes out, gets out of his car, there is a containment, I
 23 can at least contain that block, or if he continues in a
 24 northbound manner on Van Buren Street, I can continue to
 25 parallel that chase and hope he would be at least contained

1 to some degree.
 2 Q. You were driving an unmarked car at that time?
 3 A. Unmarked detective car, yes.
 4 Q. Did you have an emergency light available to you?
 5 A. Yes. That car is equipped with wig-wags on, the
 6 flashing lights, the headlights. I have a visor light that
 7 comes down, and two rear mounted lights.
 8 Q. When you say a flashing headlight, the kinds that
 9 alternate, sort of waggle?
 10 A. I guess they are called wig-wags.
 11 Q. Did you have those on?
 12 A. Yes.
 13 Q. Did you drive against traffic on Harrison Street?
 14 A. Yes, I did.
 15 Q. Was there any traffic coming your way?
 16 A. No, sir.
 17 Q. Did any cars have to turn to avoid you?
 18 A. No.
 19 Q. Where were you when you learned that the stolen polic
 20 car had taken a left and was going west on Fifth Street?
 21 A. I had actually, at that particular time, when I moved
 22 into the 400 block, I was able to get to Fifth Street, at
 23 which time, probably as soon as I got to Fifth Street I
 24 could hear the radio transmission that he was westbound on
 25 Fifth Street, which, again, I looked to my right, I could

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1 see he was coming in my direction.
 2 Q. What did you do?
 3 A. I got out of the vehicle, and I moved over to, it's
 4 the northeast corner of Fifth and Harrison Street, behind
 5 the building line at that particular time.
 6 Q. Did you go behind the building, behind meaning on the
 7 Harrison Street side of the building?
 8 A. I would have been on the Harrison Street side of that
 9 corner, yes.
 10 Q. What did you see next?
 11 A. At that particular time, he began driving, again, in a
 12 westbound manner in the 1100 block. And then he, the
 13 subject stops. As the subject stops, I begin to
 14 approach him. The reason I put the vehicle out there is
 15 again to kind of slow down the chase, actually deescalate
 16 the events that are happening. It is a pursuit through the
 17 city.
 18 One of the things here, it's the shots fired,
 19 that's a deadly force. I already know that I have deadly
 20 force --
 21 THE COURT: Mr. Parkins, the witness' testimony
 22 should be responsive to questions.
 23 MR. PARKINS: Yes, sir. I am sorry, Your Honor.
 24 BY MR. PARKINS:
 25 Q. What did you conclude about the situation as you

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1 pulled into the intersection of Fifth and Harrison?
 2 A. At the time I pulled into the intersection, I already
 3 knew of a shots fired complaint. And I took that as a
 4 deadly force had been used.

5 Again, it's a police car that was taken. I know
 6 that is at least two armed police officers.

7 How did he get the vehicle? What crime was
 8 committed? All factors that I have to take in at that
 9 particular time.

10 By pulling the car in, it's just, again,
 11 deescalating the event.

12 Q. So you pulled in the car to deescalate the event?

13 A. And contain the area.

14 Q. Now, what did you do when you got out of your car?

15 A. Went over to the northeast corner at Fifth and
 16 Harrison Streets.

17 Q. And what did you see next?

18 A. At that particular time the vehicle came into the 1100
 19 block of West Fifth, and it stopped.

20 Q. What did you do?

21 A. At that particular time, I moved out of the vehicle
 22 and began verbal commands to the vehicle, identifying myself
 23 as a Wilmington police officer, "Turn off the car and get
 24 out of the vehicle."

25 Q. Were you in plain clothes?

721

1 A. I was, yes.

2 Q. Did the driver of the stolen car respond to you when
 3 you were shouting at him?

4 A. Yes.

5 Q. What did he do?

6 A. As I was giving my verbal commands, the driver of the
 7 vehicle, who I knew was not a Wilmington police officer,
 8 made eye contact with me.

9 Q. Did he turn his head or look straight ahead at you?

10 A. He looked straight ahead at me.

11 Q. But did he turn his head to look at you?

12 A. Yes.

13 Q. What happened after he looked at you?

14 A. At that particular time, I thought that he observed me
 15 and that he was going to comply by getting out of the car
 16 and be taken into custody.

17 Q. What happened?

18 A. At that particular time, the car accelerated towards
 19 me.

20 Q. Was it going close to you or was it going at you or
 21 what?

22 A. The position that I was at, as the vehicle started
 23 accelerating, because the position I was taking is I wasn't
 24 sure if the vehicles behind us, which were marked police
 25 cars, were going to do any type of stop on him.

2 A. Behind the stolen vehicle. The stolen vehicle and the
 3 suspect begin driving at me at a high rate of speed, meaning
 4 that I have to back up to get out of the way at that
 5 particular time.

6 Q. What did you do?

7 A. I kept on backing up. And I just thought I was going
 8 to run out of real estate, run out of room.

9 Q. Did you fire your weapon at this time?

10 A. Yes, I did.

11 Q. Please tell the jury why you fired your weapon at this
 12 time?

13 A. Because I thought the suspect was going to kill me.

14 Q. Let's put down here what we know, what you knew as
 15 result of the events on Fifth Street. You said you gave him
 16 verbal commands. Am I correct?

17 A. On Fifth Street, yes, I did.

18 Q. Did he respond to those, comply?

19 A. I took his eye contact that he knew that I was giving
 20 him verbal commands.

21 Q. Did he comply with your commands?

22 A. No.

23 Q. Would you please put that information on here for us?

24 (Witness complies.)

25 Q. I believe you said he made eye contact?

723

1 A. That's correct.

2 Q. What was your belief at that time as to whether he
 3 knew you were there?

4 A. I believe that he saw me and he knew I was there.

5 Q. What happened? You said he accelerated the car?

6 A. That's correct.

7 Q. In what direction did he drive?

8 A. Right at me.

9 Q. Would you please put that on there?

10 (Witness complies.)

11 Q. What did you do?

12 A. I fired my weapon at that particular time.

13 Q. Did you move first?

14 A. At which particular time?

15 Q. When he was driving at you?

16 A. I was backpedaling.

17 Q. Would you please put that on?

18 (Witness complies.)

19 Q. Why did you fire your weapon?

20 A. Because, again, I thought his intent was to kill me.

21 Q. Please put that on.

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22 (Witness complies.)

23 Q. Now, let's talk about what happened as he drove past
 24 you. How close was he to you when he drove past?

25 A. Within arm's length.

1 Q. Closer than you are to this jury box?
 2 A. Yes.
 3 Q. As close as I am to this jury box?
 4 A. About. That's arm's length.
 5 Q. What did he do after he went past you?
 6 A. As he went past me, he struck, I guess, a white Jeep
 7 Cherokee that was parked right on the corner of the 500
 8 block of North Harrison Street.
 9 Q. And what happened then?
 10 A. He began to turn that vehicle -- well, at that
 11 particular time I knew he crashed the vehicle. I wasn't
 12 sure if he was going to go westbound. From where my vehicle
 13 I knew was parked, I didn't know at this point where he was
 14 going to go, if it was westbound on Fifth
 15 Street. In fact, what happened is when he hit the Cherokee
 16 he started turning it in a 180-degree fashion, and began to
 17 travel northbound in the 500 block of Harrison Street.
 18 Q. Incidentally, at this time did you know that Officer
 19 Kurten had pulled his car in behind yours?
 20 A. No, I did not.
 21 Q. So after he hit the car what did he do, and he spun
 22 the Jeep?
 23 A. He turned the Jeep about 180 degrees northbound, and
 24 then at that particular time he continued, he continued
 25 northbound in the 500 block himself.

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1 Q. What did you see or hear or smell at that time?
 2 A. I could smell that there was tires burning, rubber was
 3 burning. I can hear the acceleration of the engine at that
 4 particular time.
 5 Q. Could you hear tires?
 6 A. Yes, I could.
 7 Q. What were they doing?
 8 A. It seemed like they were just burning and squealing.
 9 Q. Why don't we put some of this information that is now
 10 available to you, and let's -- first of all, did he stop at
 11 all after you fired your weapon at him?
 12 A. No. He hasn't stopped for any police at that
 13 particular time.
 14 Q. Would you please put that on?
 15 (Witness complies.)
 16 Q. Now, you are a detective. Am I correct?
 17 A. That is correct.
 18 Q. Do you make decisions about, in the initial instance,
 19 about what to charge people with when you arrest them?
 20 A. I can, yes.
 21 Q. And in this particular instance, as you were on the
 22 corner, what would you have decided about what to charge Mr.
 23 Smith with?
 24 A. My first contact with Mr. Smith?
 25 Q. No. Once he drove in your direction.

1 A. I would personally charge him with an attempted
 2 murder.
 3 Q. And it was murder of you, attempted?
 4 A. In the State of Delaware, murder in the first
 5 degree -- correction. Attempted murder first, any law
 6 enforcement officer is in that statute, murder in the first
 7 degree.
 8 Q. The killing of a police officer in the exercise of his
 9 duties is murder in the first degree?
 10 A. That's correct. In the State of Delaware.
 11 Q. Would you please put that on?
 12 (Witness complies.)
 13 Q. Now, I gather that at no time did you actually see a
 14 deadly weapon in the possession of Mr. Smith. Am I correct?
 15 A. I had the car as his deadly weapon.
 16 Q. Would you please put that on?
 17 (Witness complies.)
 18 Q. And then you mentioned he hit the Jeep Cherokee?
 19 A. Yes.
 20 Q. Was that something of significance to you at the time?
 21 A. Again, his continued I guess just disregard for
 22 anybody that was out there and his eluding of the police at
 23 that particular time.
 24 Q. Would you please put on there the hitting the Jeep
 25 Cherokee?

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1 (Witness complies.)
 2 Q. And then you saw him accelerate up Harrison Street?
 3 A. Yes. He eventually I guess got clear of the Jeep that
 4 he was pushing, at which point he did get clear of the Jeep.
 5 Q. Some of the ladies and gentlemen of the jury might be
 6 curious as to why you think he was trying to accelerate --
 7 THE COURT: We don't need a speech, Mr. Parkins.
 8 Ask a question.
 9 MR. PARKINS: Yes, sir.
 10 BY MR. PARKINS:
 11 Q. If you were able to walk up the hill, which we will
 12 talk about later, and follow him, why is it that you believe
 13 he was accelerating or trying to accelerate up the hill?
 14 A. To continue to flee.
 15 Q. No. What makes you say he was trying to accelerate if
 16 you were able to walk after him?
 17 A. Because again, just the overall -- the burn marks that
 18 I could smell, I could hear, just the engine, and just the
 19 acceleration at that particular time.
 20 Q. All right. Why don't you put on there "accelerate"?
 21 (Witness complies.)
 22 MR. PARKINS: Your Honor, I don't mean to
 23 dictate to the Court any schedule. I am about to switch to
 24 a different set of demonstratives. B-079
 25 THE COURT: Are you going to need the Detective

1 Q. And the stolen police car was about even with the stop
 2 in front of it or behind it?
 3 A. I would say it was at least even with it.
 4 Q. What did you do when the car stopped at that position?
 5 A. At this particular time I thought the pursuit was
 6 actually going to deescalate, meaning that we had control of
 7 it and we could be in control of this pursuit at this
 8 particular time.
 9 Again, I was on this corner. And I began coming
 10 out in this direction, in here.
 11 Q. You are gesturing as if you came out in a sort of
 12 southeasterly direction?
 13 A. I would say that was a southbound, I took a
 14 southeasterly approach towards the vehicle.
 15 Q. Did you go on the east side of the stop sign there,
 16 the side away from us or the side that is facing us?
 17 A. I was on the other side, the east side of the stop
 18 sign.
 19 THE COURT: The sidewalk side, Detective?
 20 THE WITNESS: I started on the sidewalk -- I am
 21 sorry. It's on the other side, where you could actually
 22 read the stop sign.
 23 BY MR. PARKINS:
 24 Q. Why don't you just point?
 25 A. I am sorry. Again, from the building line, on the

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1 sidewalk, and then out into the street.
 2 THE COURT: Okay.
 3 BY MR. PARKINS:
 4 Q. How far out into the street did you get?
 5 A. Again, it was at least a carlength -- width.
 6 Q. Car width?
 7 A. Yes, sir.
 8 Q. At what point were you when you began shouting verbal
 9 orders to Mr. Smith?
 10 A. When the vehicle came to a stop and I began moving
 11 towards it, I began announcing myself as police.
 12 Q. What were you wearing at that time?
 13 A. I had a shirt with the Wilmington Police Detective
 14 logo on the chest. And knowing that, I began my verbal
 15 commands, making sure that I at least identify myself and
 16 then hopefully I could get some response from him.
 17 Q. Did you have your badge?
 18 A. Yes, I did.
 19 Q. Where was that?
 20 A. That was on, attached. It's a clip and it's on the
 21 right side of my belt line.
 22 THE COURT: Were you wearing a jacket?
 23 THE WITNESS: No, sir.
 24 BY MR. PARKINS:
 25 Q. Was the badge visible as you were outside?

1 A. Yes, it was.
 2 Q. Were you on the sidewalk when you began shouting thes
 3 orders and identifying yourself as a police officer?
 4 MR. CROSSE: Your Honor, this is leading.
 5 THE COURT: It is. Sustained.
 6 BY MR. PARKINS:
 7 Q. Where were you first when you began to shout at the
 8 driver?
 9 A. As soon as I began moving to the car, I began my
 10 announcements.
 11 Q. Did you continue to shout when you went into the
 12 street?
 13 A. Yes, I did.
 14 Q. What happened next?
 15 A. Again, I am coming from the sidewalk out into the
 16 street, at which point I am yelling. And at that particular
 17 time, again, I can see the driver. He is not a Wilmington
 18 police officer at this particular time, at which point,
 19 again, because of the situation, meaning that we weren't
 20 sure at that particular time what measures we were going to
 21 take next, meaning was it going to be a car stop, and seeing
 22 what the operator was going to do at that particular time,
 23 continue my verbal commands.
 24 Q. What did the driver do if anything before he began to
 25 drive forward again?

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1 A. He actually -- we made eye contact. He actually
 2 looked at me.
 3 Q. At that time did you have a belief as to whether he
 4 saw you or not?
 5 A. I took that as he did see me.
 6 THE COURT: We have been through this already.
 7 I certainly appreciate your wanting to have the Detective
 8 illustrate by photograph, which I think is an excellent way
 9 to demonstrate where people are positioned. But we have
 10 been through this testimony.
 11 MR. PARKINS: We will speed it up, Your Honor.
 12 BY MR. PARKINS:
 13 Q. Show the direction that the car drove when it started
 14 to come forward?
 15 A. Again, it would have been in a manner in this
 16 direction here.
 17 Q. And you are gesturing from essentially the center of
 18 Fifth Street towards the northern edge of Fifth Street,
 19 beyond the stop sign. Is that correct?
 20 A. Again, if we are going to use the truck as just a
 21 guide mark, the vehicle began westbound, and again, it began
 22 coming in this direction westbound. Again, it was in
 23 between here (indicating).
 24 Q. Would you point out to the ladies and gentlemen of the
 25 jury where you were when you fired your first shots?

1 A. I would have been somewhere in this area right here,
 2 on the street, maybe three feet from the curb line.
 3 Q. Did you fire shots after that while on Fifth Street?
 4 A. Yes, I did.
 5 Q. And where were you so far as you can remember when you
 6 fired those shots?
 7 A. Again, because of the car's acceleration at this
 8 particular time and I am backpedaling, I am on -- eventually
 9 I get to the curb, at which point, again, the vehicle is
 10 right on top of me.
 11 Q. And you are on the sidewalk at this time, sir?
 12 A. That's correct.
 13 Q. Let's see if we can take a look at the Photograph 69.
 14 What does this photograph depict?
 15 A. This is the 500 block of North Harrison, normal
 16 traffic, if you can see this vehicle right here, faces in a
 17 southbound -- that is normal traffic flow. But that vehicle
 18 is parked, but that is the normal traffic, it would be this
 19 direction is normal traffic.
 20 Q. When you say that vehicle is parked, you are pointing
 21 to a blue? I can't tell what that is, but a blue car?
 22 A. That's correct.
 23 Q. Show the jury what path the stolen police car took as
 24 it went through here?
 25 A. In this particular photograph, the front of my car,

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1 the vehicle came through and just in front of my car, and
 2 again, the Jeep here, this is the white Jeep Cherokee that I
 3 talked about, was again in front of the blue car here in
 4 this area, facing southbound, so it was facing the same
 5 direction as the vehicle here. And the stolen police car
 6 came through, striking the white Jeep.
 7 Q. What did it do after it hit the white Jeep?
 8 A. The police car continued to push this Jeep in the
 9 direction that you currently see it in the photograph.
 10 Q. I see over there some placards, it looks like 17 and a
 11 19. Do you see those, sir?
 12 A. It would be these two right here?
 13 Q. Yes. Do you know what those likely represent
 14 A. Again, EDU, the Evidence Detection Unit puts placards
 15 out. I can assume what they are. But they would either be,
 16 in a situation like this they could be spent shell casings.
 17 They can be projectiles or any other items of evidence that
 18 the evidence unit felt was necessary to preserve.
 19 Q. Did you fire any shots while you were in this area?
 20 A. In this particular area?
 21 Q. Yes.
 22 A. No, sir.
 23 Q. Would you -- what did you do after the stolen police
 24 car hit the Jeep?
 25 A. Again, as the police car began -- after I realized

1 that the vehicle, the stolen police car was going to take a
 2 northbound route, I began to continue up the sidewalk,
 3 monitoring the police vehicle. You have to realize it was
 4 on the outside of the Jeep at this particular time, in this
 5 area.
 6 Q. You say you continued on the sidewalk and you are
 7 pointing to the eastern sidewalk of Harrison Street?
 8 A. This would be the east side of North Harrison Street.
 9 Again, I was taking a northbound direction. It would be up
 10 the street.
 11 Q. Is there a hill there?
 12 A. There is, yes.
 13 Q. Going up or down the hill?
 14 A. I would call it in a northbound direction. But I was
 15 going up the hill.
 16 Q. Did you at any time enter into the street on Harrison
 17 Street?
 18 A. I did. And it's beyond this vehicle in this area
 19 right here.
 20 Q. When you say beyond this vehicle, you are gesturing to
 21 beyond the blue vehicle?
 22 A. That is correct. Beyond this blue vehicle. It would
 23 be, I guess, the back trunk area, the rear bumper.
 24 Q. And where were you, sir, when you fired your final
 25 three shots? In what general area?

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1 A. I would have been in the street, in that particular
 2 area.
 3 Q. Behind the parked blue vehicle?
 4 A. Yes.
 5 MR. PARKINS: Would you show me, Mr. White,
 6 please, DX-79.
 7 BY MR. PARKINS:
 8 Q. Does this photograph -- what does this photograph
 9 depict?
 10 A. This is the front of the white Cherokee. Obviously,
 11 you can see the vehicle damage at this particular time from
 12 the impact of the stolen police car. The other thing you
 13 can also see is, again, this is a mark that was determined
 14 to be an acceleration mark.
 15 Q. What vehicle caused the acceleration mark?
 16 A. That was the stolen police car.
 17 Q. Thank you.
 18 Thank you, Mr. White.
 19 Detective, what I would like to do is to review
 20 with you briefly some of the policies of the Wilmington
 21 Police Department and ask you how you applied those policies
 22 in this particular situation.
 23 A. Yes, sir.
 24 Q. Detective, can you see that from where you are?
 25 A. Yes, I can.

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1 Q. What is the highlighted information that is here?

2 A. This is our force continuum that we have for the

3 Wilmington Police Department.

4 Q. Can you explain to the jury what a force continuum is

5 insofar as the Wilmington Police Department interprets it?

6 A. Any use of force that the Wilmington Police Department

7 is going to take, we use the continuum. What a continuum

8 is, if you could read it here, again, it goes from different

9 elements of what we kind of use as our continuum. Some

10 people call it I guess a ladder. There is other

11 definitions. But it's a force continuum. What you do is

12 try to exercise each of those elements as it applies when

13 you are effecting an arrest.

14 Q. What are the elements in the force continuum here?

15 A. You have physical presence. Verbal warning. Verbal

16 command. You have a hands-on control. A hands-on

17 countermeasure. Intermediate weapon. The last one would be

18 a deadly weapon -- correction, deadly force.

19 Q. I think all of us can understand the first three. We

20 won't take time to explain those. But what are hands-on

21 countermeasures?

22 A. Hands-on countermeasures would be if you have to use

23 your hands or I guess even your feet. If may be you have a

24 subject resisting in a manner that maybe you have to apply

25 either a wrist lock or leg sweep to an individual maybe.

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1 That would be considered a hands-on countermeasure.

2 Q. The next item is intermediate weapon, which includes

3 choice of a chemical weapon, asp baton, or taser. What is

4 an -- what is the chemical weapon referred to here?

5 A. Chemical weapon is generally our pepper spray or OC

6 spray that we carry.

7 Q. What is an asp baton?

8 A. Our asp baton is actually the expandable bat. You

9 actually kind of give it a wrist throw and it will expand.

10 Q. And a taser, I think most of us have heard about that.

11 Maybe you could tell us?

12 A. A taser is an electronic device. We carry one that

13 actually shoots darts at a distance of 21 feet.

14 Q. Did you have on that night a chemical weapon, an asp

15 baton or taser with you?

16 A. No, sir.

17 Q. Let's look at the next paragraph for a second. Can

18 you tell us -- I guess I will have to read it for the

19 record:

20 "However, members should be mindful that the

21 force needed to control an incident may not fall on the

22 prescribed continuum sequentially in all circumstances.

23 Therefore, members should use their discretion to quickly

24 and safely apply the necessary level of force to meet

25 situations involving arresting, safety of citizens or

officer self-defense.

What does that mean?

3 A. What that pretty much says is that as you go -- if I

4 have to arrest a subject -- and again, there is different

5 levels. If he actively resists, there is different

6 elements. What happens is, if he doesn't have gun, so to

7 speak, and I go to approach him and he pulls out a gun, the

8 force continuum could change immediately as I effect that

9 arrest. Thus, we don't have to necessarily stay with each

10 of those steps as prescribed.

11 Q. Were you able to go through the entire force continuum

12 on the night of September 13th?

13 A. No, I was not.

14 Q. Where did you start?

15 A. I started at police presence, continued to verbal

16 commands.

17 Q. Then what was the next step that you used?

18 A. Deadly force.

19 Q. The next procedure or policy that we have highlighted

20 are some of the parameters for using deadly force. Would

21 you please read for us Item 1, so that we have a record of

22 it?

23 A. Yes, sir. No. 1.

24 "An officer is authorized to unholster his

25 pistol whenever he has reasonable suspicion to believe that

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1 he or anyone in his immediate vicinity is in imminent danger

2 of physical harm."

3 Q. Earlier this morning you prepared this chart which

4 contains the information that you knew. Can you see that

5 from here, Detective?

6 A. I can, some of it, yes. That's okay.

7 Q. Which of these factors in your view authorized you to

8 unholster your weapon?

9 A. The initial "Shots fired" call is a deadly force. I

10 took that as at least I could unholster my weapon at that

11 particular time.

12 Q. The next item in the use of force parameters or deadly

13 force parameters, "If feasible, prior to using a firearm,

14 the officer shall identify himself as a police officer and

15 shall give warning."

16 Did you do that on this evening?

17 A. Yes, sir.

18 Q. What did you do to identify yourself?

19 A. I told --

20 THE COURT: You have gone through that, Mr.

21 Parkins. I would like to move this along.

22 MR. PARKINS: Yes, sir.

23 THE COURT: This is the third time you have

24 asked him to discuss this.

25 MR. PARKINS: Yes, sir.

B-082

1 BY MR. PARKINS:

2 Q. Did you have a belief as to whether there were
3 exceptional circumstances here?

4 A. Yes.

5 Q. And is the belief based on anything other than what
6 you have already told us?

7 A. No, it is not.

8 Q. Detective, how long were you at the scene after the
9 shooting was concluded?

10 A. Not long.

11 Q. Did you see any jubilation or high-fiving or laughing
12 among the officers?

13 A. No, sir.

14 Q. What was the mood in the police car as you were taken
15 back -- first you went for coffee -- strike that.

16 Where did you go after you left the scene?

17 A. We were sequestered into a vehicle, at which point we
18 knew we were going back to our police headquarters, which is
19 protocol. We did stop for coffee. But again, the mood in
20 the car was I guess very calm, in the degree that no one was
21 really talking at all, from the situation.

22 Q. No laughing?

23 A. No, sir.

24 Q. Joking?

25 A. No, sir.

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1 Q. High-fiving?

2 A. No.

3 Q. Did you at any time ever shoot at this vehicle while
4 it was stopped?

5 A. While it was stopped? No, sir.

6 Q. Looking back on things, how do you feel about these
7 events today?

8 A. Tragic incident. I wish I never used -- I wish I was
9 never placed in a predicament to use deadly force. I don't
10 think any law enforcement officer wants to do that, no.

11 MR. PARKINS: Thank you. Nothing further.

12 THE COURT: Ms. Sulton, you may cross-examine.

13 Detective, Mr. Parkins has asked a couple of
14 witnesses about a beanbag gun. What is it?

15 THE WITNESS: Wilmington Police, we do have a
16 beanbag gun. We use it as a shotgun. It comes in a
17 12-gauge variety. Our SWAT team is authorized to take that
18 out. Again, that is considered a less than lethal, I guess
19 firearm that we use. But again, only our SWAT team is
20 qualified in that because we never want to give that to our
21 patrol units to criss-cross our rounds. So we are
22 authorized to take it out.

23 THE COURT: I wanted to make sure the jury
24 understands.

25 THE WITNESS: Again, a beanbag, again, is a less

1 than lethal, from a distance -- say a subject had a knife.

2 You could effectively, from here, even maybe to the wall,
3 direct a shot with a beanbag round and hopefully have that
4 suspect again drop the knife or at least gain control of
5 that situation. It's just a less than lethal use that we
6 have within our department.

7 THE COURT: Thank you.

8 Ms. Sulton, do you need that easel up?

9 MS. SULTON: I might.

10 THE COURT: I was going to have Mr. Parkins
11 remove it.

12 MS. SULTON: That is not necessary, Your Honor.

13 CROSS-EXAMINATION

14 BY MS. SULTON:

15 Q. I would like to take you back just briefly to the
16 pursuit, Detective Ciritella. What number car were you
17 behind Car 1180?

18 A. At which point, ma'am?

19 Q. When you joined the pursuit, were you car No. 5, 6, 7,
20 8?

21 A. Initially, when I saw the vehicle at Fourth and
22 Jefferson Street, I would describe my number maybe as No. 6

23 Q. And was there any point at which you were, prior to
24 the point at which you broke off and went in the other
25 direction from the caravan, was there any point at which you

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1 were closer than 35 feet to the rear bumper of Car 1180?

2 A. I don't believe so, no.

3 Q. Could you explain how you could see Car 1180 drive
4 erratically when you did not see Marilyn Garcia, who was
5 sitting on the porch on the steps at the intersection of
6 Fifth and Harrison Street?

7 A. The intersection of Fourth and Jefferson in the City
8 of Wilmington, again, what I see on this particular day very
9 clear, at that particular time in the city -- it is actually

10 I guess a downgrade, it actually kind of slopes down, at
11 that particular time, we are in -- I guess we are traveling
12 westbound, but we are kind of in the middle with our lights
13 activated. As the vehicle comes out of Fourth and Monroe
14 Street, he comes out, he comes out to my line of view.

15 Q. Did you see Car 1180 hit another car?

16 A. Yes. The white Jeep Cherokee.

17 Q. Other than that, along the pursuit?

18 A. No, ma'am.

19 Q. Did you see it hit a person?

20 A. No, ma'am.

21 Q. Do you know whether or not Officer Donohue was
22 reporting what was going on along the route?

23 A. Yes, she was.

24 Q. And are you aware that Officer Donohue was reporting
25 that there were no injuries or accidents along the way?

B-083

1 A. It would have been in between my vehicle, which is the
 2 maroon Crown Vic, Crown Victoria -- this is actually a stop
 3 sign. I don't know if you can see it in the photograph. It
 4 would have been in this path right here, ma'am.
 5 Q. Do you see those stairs that are just adjoined almost
 6 to the building there, or the home on the corner, they are
 7 white stairs? Can you tell that from this photograph?
 8 A. I believe you are talking about this area right in
 9 here ma'am?
 10 Q. Yes.
 11 A. Yes, ma'am.
 12 Q. That's where Marilyn Garcia was sitting when she was
 13 shot. Correct?
 14 A. That is reported, yes, ma'am.
 15 Q. And you were standing right at that corner after you
 16 exited your vehicle?
 17 A. That's correct, ma'am.
 18 Q. And you never saw Marilyn Garcia?
 19 A. No, ma'am.
 20 Q. While you were walking up the street shooting at Mr.
 21 Smith, did you ever see Mr. Gwyn standing right on the
 22 sidewalk on the other side of the street?
 23 A. And I believe you would be referring to this sidewalk,
 24 that would be the west side of the street?
 25 Q. Correct.

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1 A. No, ma'am.
 2 Q. And this is daylight, again. Correct?
 3 A. That's correct.
 4 Q. Did you see Officer Kurten shooting while you are
 5 shooting?
 6 A. No, ma'am.
 7 Q. Did you see Officer Dempsey shooting?
 8 A. No, ma'am.
 9 Q. And he was on the driver's side of the vehicle, he
 10 testified. Correct?
 11 A. That's correct, ma'am. I never saw him engaged in
 12 this target -- or this suspect. He would have been, it's
 13 just off the picture line. It would have been to the
 14 driver's side of my door when I first saw Sergeant Dempsey.
 15 He would have been in that area, ma'am.
 16 Q. And you never saw the other people who were located on
 17 the street or on the sidewalks or on the porches on Harrison
 18 Street?
 19 A. No, ma'am.
 20 Q. So at any time during which you fired 13 shots, you
 21 never saw Ms. Garcia, you never saw Officer Dempsey, you
 22 never saw Officer Kurten, you never saw Mr. Gwyn or Mrs.
 23 Gwyn, none of those people?
 24 A. I think I testified to seeing Officer, or Sergeant
 25 Dempsey. Again --

1 Q. While firing?
 2 A. While firing, no, ma'am, I did not.
 3 Q. Who, then, in the immediate vicinity was in an
 4 imminent threat of serious injury or death?
 5 A. At this particular time, as the vehicle drives past,
 6 Officer Dempsey is in this line. I still do not know which
 7 direction the vehicle is going.
 8 Q. So let me widen the time frame. From the moment that
 9 you discharged your first bullet to the moment at which you
 10 fired your 13th bullet, who at the time that you are doing
 11 the firing, who was in the immediate vicinity at imminent
 12 risk or threat of death or serious bodily injury? Who?
 13 A. Sergeant Dempsey.
 14 Q. When?
 15 A. When the vehicle drives past me, he is on the driver's
 16 side, as I indicated. Again, the stolen police vehicle has
 17 not made a directional change at that particular time. As
 18 it turns, I stop firing.
 19 Q. So how many shots did you fire while you thought
 20 Officer Dempsey was in imminent risk of serious death or --
 21 I mean serious injury or death?
 22 A. I would say four-to-six range, ma'am.
 23 Q. Okay. So if we subtract six shots -- let's subtract
 24 nine. Who was in the immediate vicinity when you fired your
 25 last four shots?

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1 A. In the immediate vicinity, he posed a threat by his
 2 actions at that particular time.
 3 Q. Who is in the immediate vicinity?
 4 A. I am in the immediate vicinity at that particular
 5 time. He is still a risk. He still has control of the
 6 scene. The other officers while he is driving in a
 7 northbound manner are in that vicinity. He has a car,
 8 ma'am, which is not on foot.
 9 The element that he has a vehicle means that he
 10 can go, the general public, if he continues past that
 11 intersection, continues to drive, everyone is at risk at
 12 this particular time, as I perceive it.
 13 Q. Are you bound by the requirements of the use of deadly
 14 force policy as articulated in the police officers' manual?
 15 A. No, ma'am.
 16 Q. I would like to ask you a little bit about Sergeant
 17 Browne. You have worked with him for well over a decade.
 18 Correct? I believe his title is Lieutenant Browne, William
 19 Browne, who testified here yesterday. Correct?
 20 A. Yes, ma'am.
 21 Q. And you have worked with him for over a decade.
 22 Correct?
 23 A. I have been on the force with him for 20-plus years.
 24 But as my immediate supervisor, is that what you are asking
 25 me?

1 Q. No. Is it fair to say that in your work at the police
2 department that you have come to know William Browne?
3 A. That's accurate.
4 Q. And is it fair to say that in your opinion, based upon
5 your experience with him, that he strives to be accurate
6 when writing reports?
7 A. I would say that is correct.
8 Q. You are aware that Mr. Browne conducted the
9 investigation in this case. Correct?
10 A. Correct.
11 Q. And you are aware that he wrote a report as a result
12 of his investigation?
13 A. That's correct.
14 Q. So if he says in his report, during this time
15 Detective Ciritella was aware of the other officers firing,
16 he was incorrect?
17 A. I would say that's yes.
18 Q. If he says in his report that you were crouched in a
19 tactical position, would he be incorrect?
20 A. I think I have described a tactical position, and
21 again, I guess, if you want to call it a crouch, maybe an
22 isosceles, it is a stance that I describe, I call it a
23 tactical stance. So, no, he wouldn't be inaccurate at that.
24 Q. Do you recall me taking your deposition and asking you
25 whether or not you were crouched in a tactical position?

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1 A. Yes, ma'am, I do.
2 Q. Do you recall your answer?
3 A. I believe I did not have an example of what you define
4 as crouching in my deposition.
5 Q. Didn't you deny that you were in a crouched tactical
6 position?
7 A. No, ma'am. I don't think we ever defined what a
8 crouching position was in my deposition.
9 Q. Let's take a look at your deposition.
10 A. Yes, ma'am.
11 MS. SULTON: If you would be kind enough,
12 counsel, I'm on Page 90.
13 THE WITNESS: I am sorry. I didn't hear you.
14 BY MS. SULTON:
15 Q. Page 90. Let's start at Line 8. Let me know when you
16 are there.
17 A. Yes, ma'am.
18 Q. My question was: "Then you fire between two and four
19 rounds into the windshield?"
20 And your answer?
21 A. "That's correct."
22 Q. My question: "You are backpedaling as you are
23 discharging your weapon these first two or four times?"
24 And your answer?
25 A. "That I don't know."

1 Q. Question: Was there ever any point at which you had
2 got into a crouching position and --"
3 Your answer?
4 A. "No, ma'am."
5 Q. "Question: No? So if someone says in some report
6 somewhere that you got into a crouching position, that's
7 just incorrect because that didn't happen, did it?"
8 And your answer?
9 A. "I don't believe so, no."
10 Q. If you thought that Mr. Smith posed such a danger whe
11 you left the police station, as a member of the SWAT team,
12 why did you not call for their assistance?
13 A. Because I am not authorized to do that, ma'am.
14 Q. Do you know if the SWAT team was ever called out?
15 A. No, ma'am, they were not.
16 MS. SULTON: If I can have just a minute, Your
17 Honor.
18 THE COURT: Sure.
19 BY MS. SULTON:
20 Q. So, now, after the Car 1180 passes you, and it passes
21 this sidewalk, and it's going up the hill, was there a point
22 at which before you shot Mr. Smith in the head that you knew
23 you had hit him with another round?
24 A. I am sorry. Repeat your question one more time,
25 please.

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1 Q. After the car crosses the curb and goes from Fifth
2 Street up Harrison Street --
3 A. Ma'am, can I walk through? I want to make sure you
4 are accurate.
5 Q. I would like to ask the question. If I don't ask a
6 proper question, please let me know.
7 A. Yes, ma'am.
8 Q. Let me try again. After the car crosses the curb, and
9 it is now heading the wrong way up Harrison Street, was
10 there a point at which you realized you hit Mr. Smith with a
11 bullet?
12 A. No, ma'am, there was no time that I hit him, in this
13 area while he was driving the vehicle, I still had eye
14 contact with him and he was still fully operable of the
15 stolen police car at that particular time.
16 Q. And how far was your body from the vehicle?
17 A. At this particular time, I am on this sidewalk right
18 here, and again, he is accelerating in a northbound, pushing
19 the white Jeep Cherokee in a 180-degree direction, at which
20 point I then come up behind, I guess this is a blue, it
21 looks like a Grand Prix on the picture.
22 Q. Okay. So after that point, you are still firing your
23 gun. Correct?
24 A. No, ma'am, I am not. I had stopped firing as the
25 vehicle passed me.

B-085

1 Q. So you stopped firing as the vehicle passes you.
 2 Correct?
 3 A. That's correct.
 4 Q. And it's also correct that you started firing as the
 5 vehicle is passing you. Correct?
 6 A. At which point?
 7 Q. When you fired your first shot, the vehicle had
 8 already passed you. Correct?
 9 A. No, ma'am.
 10 Q. Well, let's take a look at -- do you have the black
 11 book? Let's take a look at another exhibit.
 12 A. Yes, ma'am.
 13 Q. If you could take a look at Exhibit No. 17?
 14 A. 17, ma'am?
 15 Q. Yes, please.
 16 A. Yes, ma'am.
 17 Q. I am going to show you just a little bit clearer
 18 version of that photograph. You have seen this photograph
 19 before. Correct?
 20 A. I believe yesterday, ma'am.
 21 Q. And you see that there are dowel sticks that are
 22 placed there, I am going to represent to you that they were
 23 done by someone at the Wilmington Police Department.
 24 A. That's correct.
 25 Q. Do you see that the dowel sticks indicate that the

1 bullets came in at an angle? Correct?
 2 A. No, I do not, ma'am.
 3 Q. You don't see that?
 4 A. The dowel marks are marks are used in the Evidence
 5 Detection Unit to get an idea of how this incident happened.
 6 The dowel marks are placed in the car. Again, if you
 7 notice, that dowel mark, let's just use the hood, if they
 8 are just laying on the hood, the trajectory is not accurate.
 9 And again, because of the hole in the windshield, it can be
 10 moved, to change the trajectory.
 11 I don't know any of the writing -- I can't tell
 12 you which round is mine on this particular photograph,
 13 ma'am.
 14 Q. Do you know anyone else, sir, who was firing bullets
 15 from the passenger side of that vehicle other than you?
 16 A. No, ma'am, I was the only one.
 17 Q. So let's take a look at another photo. Let's take a
 18 look at Exhibit No. 18.
 19 A. Yes, ma'am.
 20 Q. It's a collection of photos. Do you see those dowel
 21 markers or dowel sticks?
 22 A. I see four photographs, ma'am, with I guess dowel
 23 markers.
 24 Q. If we go to the one that is on the top right, you see
 25 that there are some dowel markers that suggest that there

1 were some shots fired, some additional shots fired on the
 2 passenger side. Correct?
 3 A. We are talking about this photograph here, ma'am?
 4 Q. That is correct.
 5 A. Are they entrances or exits? Impact rounds? Can you
 6 tell me what they are?
 7 Q. Do you know?
 8 A. No, ma'am, I do not.
 9 Q. So you are on Harrison Street. There is a point at
 10 which you step from the sidewalk into the street. Correct?
 11 A. That is correct.
 12 Q. And you begin firing again. Correct?
 13 A. No, ma'am. The vehicle approaches me, attempts to run
 14 me over --
 15 Q. I am sorry, sir. Let me sharpen my question.
 16 We are now on Harrison Street?
 17 A. Harrison Street, yes, ma'am.
 18 Q. The Car 1180 has moved beyond where the Jeep Cherokee
 19 comes to rest?
 20 A. Yes, ma'am.
 21 Q. Does there come a point when you step out into the
 22 street on Harrison Street?
 23 A. Yes, ma'am.
 24 Q. And what do you do after you step into the street?
 25 A. I fire into the Vehicle 1180.

1 Q. How far are you from the Vehicle 1180 at the time that
 2 you begin those shots?
 3 A. Probably less than eight feet.
 4 Q. Less than eight feet?
 5 A. If I am out on the street, I know I am now a
 6 carlength -- width out into the sidewalk. So I am half of a
 7 carlength, what is the width of a vehicle, seven, eight
 8 feet. I am half of that distance, then Vehicle 1180 is
 9 right there.
 10 Q. So when you start your second round of firing, are you
 11 behind the car or are you even with it? When I say even
 12 with, say at a 3:00 position, as it relates to the front
 13 passenger door?
 14 A. I would say I was at the 3:00 position, ma'am.
 15 Q. Of the front passenger door?
 16 A. Yes, ma'am.
 17 Q. When you fire your second round of shots?
 18 A. Yes, ma'am.
 19 Q. And how many shots did you fire while you were in that
 20 position?
 21 A. Three, ma'am.
 22 Q. And what were you shooting at?
 23 A. I was shooting at the threat. Mr. Smith was still
 24 operable in the vehicle. At that particular time he still
 25 had control of that situation.

1 IN THE UNITED STATES DISTRICT COURT
 2 IN AND FOR THE DISTRICT OF DELAWARE

3 - - -

4 HARRY SMITH JR., and : Civil Action
 5 ROSYLN WOODARD SMITH, :
 6 individually and as :
 7 Administrators of The :
 8 ESTATE OF HARRY SMITH, III :

9 Plaintiffs, :
 10 :
 11 :

12 v. :
 13 :
 14 :

15 CITY OF WILMINGTON, :
 16 JOHN CIRITELLA, in his :
 17 individual capacity and in :
 18 his capacity as a police :
 19 officer of the Wilmington :
 20 Police Department, :
 21 THOMAS DEMPSEY, in his :
 22 individual capacity and in :
 23 his capacity as a police :
 24 officer of the Wilmington :
 25 Police Department, :
 26 :

27 Defendants. : No. 04-1254-GMS

28 - - -

29 Wilmington, Delaware
 30 Monday, April 16, 2007
 31 9:00 a.m.

32 - - -

33 BEFORE: HONORABLE GREGORY M. SLEET, U.S.D.C.J.,
 34 and a jury

35

36

B-087

1 written reports were done by any of these defendants.

2 THE COURT: I don't think that is accurate.

3 Let's talk about it. I think I recall hearing testimony
4 about at least one of the defendants writing a report. I
5 could be wrong about that. Am I wrong about that?

6 MR. PARKINS: I think what you may recall, Your
7 Honor, is there was evidence about one of the defendants
8 gave another statement to Internal Affairs, which was
9 transcribed.

10 THE COURT: Maybe it was that.

11 MS. SULTON: That is Exhibit 21.

12 So you contend what? And please be specific,
13 counsel.

14 MS. SULTON: We contend that the defendants have
15 either spoiled or hidden information about what occurred on
16 that evening, and that that includes the videotape that
17 should have recorded almost all of this incident as well as
18 the failure to write reports on this incident. We believe
19 that they intentionally have either spoiled or concealed
20 that information from us, and we should be able to have the
21 jury so instructed, that whatever that information is, it
22 would have been detrimental to them.

23 THE COURT: The evidence that supports your
24 contention.

25 Your belief, Mr. Crosse?

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1 MR. CROSSE: Your Honor, as I understood it --
2 and I am just thinking of the practice -- when I was with
3 the City Solicitor's Office, was that when there was a
4 shooting, the three officers, or two officers are brought
5 in. You write a report. You write a report. You write a
6 report. Then somebody looks at all three of those reports.

7 That didn't happen in this case. We had Mr.
8 Wiener brought in to counsel the police officers, and there
9 is a videotape of a statement. The only thing that was
10 written was the front page that said, you are willing to
11 give a statement.

12 So it just seems that they didn't comply with
13 the policy that says there should be a written report. They
14 took a statement from the guys with counsel present. You
15 know, I would hope that counsel spoke with them before they
16 put them in the room and explained what happened, rather
17 than them coming in and writing fresh in their mind, what
18 did you do? What did you see?

19 THE COURT: Let me ask this: Were these
20 interviews with these officers videotaped?

21 MR. CROSSE: Yes, Your Honor.

22 MS. SULTON: And it is in evidence. It is an
23 admitted exhibit.

24 THE COURT: You were provided with the
25 videotapes of the videotaped interviews of each officer?

1 MR. CROSSE: Yes, sir. I think they are about

2 ten minutes apiece.

3 THE COURT: These videotaped interviews were
4 done immediately upon the officers' return to headquarters?
5 When were they done?

6 MR. CROSSE: I think late that night.

7 MS. SULTON: About six hours or so.

8 THE COURT: I understand the contention, and I
9 will hear from the defendants on why the procedure wasn't
10 followed. Were these, as far as you know, done in lieu of
11 written reports?

12 MR. CROSSE: I don't know if that is an argument
13 that is going to be made. But I specifically asked their
14 expert, should it be done? He said yes. Do you know why it
15 wasn't done? He said that's an internal disciplinary matter
16 to be taken up.

17 So he recognized it. That was Mr. Traenkle.

18 THE COURT: So it's the plaintiffs' contention
19 that the writings would have somehow been materially
20 different from the video recordings and that they left out
21 information during the video interviews that would have been
22 included in the written reports that would have been
23 detrimental to the defendants' case.

24 MR. CROSSE: We don't know. It would have been
25 an individual statement by the defendants as to what they

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1 recall happening. And then Browne could have taken that and
2 interviewed them. But instead, what we have is the video
3 interview with an attorney present, and tell us what
4 happened.

5 THE COURT: What is the specific police policy?

6 MS. SULTON: It is 6.7 and 6.8. Both of those
7 are in evidence at Tab 12.

8 THE COURT: Do we have it here?

9 MS. SULTON: The policy specifically says that a
10 written report must be done. It doesn't say anything about
11 in lieu of an interview.

12 THE COURT: I want to say this to both
13 plaintiffs' counsel, that in your proposed instruction you
14 don't mention anything about written reports. You talk
15 about the videotape. So you have added, apparently -- I
16 don't see anything regarding interviews. I know that
17 something has been made of this during the course of the
18 trial and before.

19 So the record is clear, and so Messrs. Parkins
20 and Fineman know where I am looking, I have been handed
21 plaintiffs' exhibit book. I am looking at Exhibit 12,
22 specifically at Subsection (d), Reporting Uses of Force. Is

23 this 6.7?

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24 MR. CROSSE: I am not sure.

25 THE COURT: Let me just take a quick look.

1 (Pause.)

2 So it would seem a good place to start perhaps
3 might be with counsel, somebody telling me what counsel's
4 understandings are, what you believe, whatever the proper
5 English is, of the standard that I am to apply in addressing
6 the whole issue of spoliation. The standard, what are the
7 factors that I should consider in determining whether to
8 give a charge of this type?

9 MS. SULTON: Well, I am not specifically certain
10 if there are set standards in place.

11 THE COURT: There are factors. I have written
12 on it, quite frankly, if you could look me up. I have
13 written a fairly strong opinion on the issue of spoliation
14 in a case that is fairly well-known around these parts.

15 So there are considerations. There are factors.
16 There are standards that guide most of what judges do. And
17 certainly there are standards that guide this issue, should
18 guide me on this issue as well. And it strikes me, would it
19 not be a federal law issue? An issue of perhaps federal
20 common law probably?

21 MS. SULTON: It is my understanding that if the
22 defendants -- if the party against whom the issue is being
23 raised had control, so it's in their control, I think that
24 is one of the issues.

25 THE COURT: I don't think there is any dispute

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1 about that.

2 MS. SULTON: And that if, under all of the other
3 facts and circumstances, that item of evidence should have
4 been available, and it's not, and there is no explanation
5 provided by the defendants for why that item of evidence is
6 not available when they had control, and every other fact
7 and circumstance suggests that it should have been
8 available, then I think those are among the factors that the
9 Court would consider to determine whether or not the
10 instruction should be given.

11 In this particular case, it happens to be a
12 critical piece of information.

13 THE COURT: Which are we talking about, the
14 reports or the video or both?

15 MS. SULTON: I am talking about both. But if
16 you want me to focus just on the video at first, I can.

17 THE COURT: We were talking about the reports.
18 Let's keep our focus there.

19 Given that there were recorded interviews,
20 video-recorded interviews, why do you characterize the
21 absence of written reports as a critical failing or failure?

22 MS. SULTON: The absence of written reports is
23 critical because, not just 6.7, but 6.8, on the pursuit
24 policy, also requires an officer as well as the officer's
25 supervisor to ensure that that officer has a written report

1 filed. And they list a number of reasons in their rules for
2 why they believe a written report is required.

3 THE COURT: I am sure there are very good
4 reasons for writing written reports. Quite frankly, I think
5 it is unimportant that there are not written reports in this
6 matter.

7 MS. SULTON: And I asked each of the officers,
8 were there any other circumstances, when they were involve
9 in a serious matter, if they hadn't written a report? I am
10 not certain I asked Mr. Ciritella that. I did ask the
11 others.

12 THE COURT: I am accepting for the moment that
13 the process that is prescribed by the Wilmington Department
14 of Police, the preferred process, if not the required
15 process, is that written reports be prepared. But what we
16 have is a situation where apparently, in lieu of written
17 reports -- and perhaps it's not fair for the Court to
18 characterize it that way -- we do have some reporting that
19 was recorded from at least three of the participants. I
20 don't remember who else was interviewed, if anybody else.
21 But we know the three defendants were interviewed. Those
22 interviews were recorded.

23 MS. SULTON: Yes.

24 THE COURT: I don't know what was, commanders
25 and supervisors, what was on their minds when they decided

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1 not to have a writing. But it's not as if they didn't have
2 a recording made, some preservation of the recollections of
3 these participants exists.

4 MS. SULTON: That is correct, Your Honor.
5 However, the matter they were investigating, it was a
6 criminal investigation when it first started. And the
7 ten-minute -- some of these interviews I am not even certain
8 run ten minutes -- are not a substitute nor are they in lieu
9 of a written report, the requirement that a written report
10 be done. In a --

11 THE COURT: Says who?

12 MR. CROSSE: Says the regs.

13 THE COURT: Let me get a response.

14 MR. PARKINS: I don't know where to begin. I
15 will start -- I will work forward.

16 Your Honor asked about, among other things, the
17 factors to be considered in spoliation. I know that Your
18 Honor has written probably more spoliation opinions than the
19 rest of the judiciary combined, both state and federal here.

20 As Your Honor is well-aware, one of the issues
21 is whether the defendants in this case had anything to do
22 with the destruction of the evidence. And there is not one

23 iota of evidence that the defendants had any role whatsoever
24 in the decision not to require written reports. They just
25 did what they were told: Don't do these written reports.

1 or touched it. It was removed that night after these
2 officers had left the scene. So they had no control over
3 it.

4 Secondly, whether there should have been a slip
5 or not is not the fault of these defendants.

6 THE COURT: Mr. Crosse, the problem with your
7 argument that you make is exactly that which Mr. Parkins
8 points out. The city is not at this table. They are not at
9 the defense table. Had that been the case, this might be a
10 different discussion altogether.

11 So I won't give a spoliation instruction with
12 regard to the videotape or the absence of written reports,
13 given the defendants that are at the table.

14 MS. SULTON: If I could just finish my record,
15 Your Honor.

16 THE COURT: No. You have preserved your record.

17 MS. SULTON: Thank you, sir.

18 MR. CROSSE: Your Honor, we won't be prohibited
19 from arguing about it, though.

20 THE COURT: Well, I guess we should talk about
21 that.

22 MR. CROSSE: I would think that the jury should
23 be allowed to make whatever inference they can make, that
24 there is a tape there, that it was working the day before,
25 and somehow it does not have this instance on it.

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1 THE COURT: Mr. Parkins.

2 MR. PARKINS: There is no rational inference
3 that these defendants are at fault because the tape wasn't
4 working.

5 THE COURT: See, we can talk about this a little
6 bit more. The concern that I have is that they didn't have
7 control over 1180. We are talking about the tape from 1180.
8 Right?

9 MR. CROSSE: Yes, Your Honor.

10 THE COURT: The only person who could
11 conceivably be said to have had any contact with the video,
12 and we know from the testimony that even he couldn't, was
13 Whitehead, who testified in this case -- that is, his
14 partner I don't think testified. So again we have Kurten,
15 Dempsey and Ciritella, who, there is no evidence, as far as
16 I recollect from the record, had anything to do with 1180
17 other than shooting at it, at its occupant, Mr. Smith.

18 So I don't know how it would be fair -- I don't
19 know how it would be reasonable, Mr. Crosse -- let's presume
20 that I permitted you to say, ladies and gentlemen, isn't it
21 mysterious that the static, the fact we see very few clear
22 images on the videotape, you can reasonably infer from that,

23 or reasonably infer the liability of these officers. That's
24 ultimately what you want them to do. That is that they were
25 hiding something, whatever it is you might argue.

1 I am trying to fathom how that would be a

2 reasonable inference, that is, that these officers did
3 something that should bear upon their liability in this
4 jury's mind with regard to this videotape, not having had
5 any contact with it or any ability to control it. Do you
6 see the problem I am having? I am trying to make the
7 logical connection, the reasonable connection, that a jury
8 might make. I think that would lead them afield. Again, it
9 would certainly be incumbent, would have been incumbent upo
10 the City of Wilmington, the Department of Police, to take
11 into custody, to preserve the chain of custody, to make
12 sure, whatever they needed to do to preserve this evidence,
13 this particular item being a videotape, if it had evidence.
14 But they are not here anymore.

15 MR. CROSSE: But there has been testimony about
16 the videotape and its functioning or non-functioning in this
17 case.

18 THE COURT: And the jury is going to wonder
19 about that, in all likelihood.

20 MR. CROSSE: Then I should be able to say, it's
21 not working. And he should be able to say, it's not their
22 fault. And they make whatever inference and common-sense
23 conclusion that may warrant. It is not just to have it in
24 the case and nobody can talk about it. I would rather let
25 them see the positions, and then let them decide.

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1 THE COURT: Mr. Parkins, Mr. Crosse implies a
2 point. That is that the questions along those lines didn't
3 draw an objection. The objection might have been sustained.

4 MR. PARKINS: Given Mr. Crosse's point, if what
5 he is going to say is it's not working, that's fine. If he
6 is going to say and it's not working and it's not working
7 because it had evidence that was --

8 THE COURT: He can't affirmatively say that.

9 MR. CROSSE: Nobody knows.

10 THE COURT: Mr. Crosse, I will accede to your
11 point.

12 MR. PARKINS: All right.

13 THE COURT: We need a probable cause
14 instruction, I am just reminded. I am at Page 18, is the
15 next of the plaintiffs' federal claims.

16 MS. SULTON: There were some changes that we
17 made to that.

18 THE COURT: Did you deal with the italicized
19 language?

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20 MR. FINEMAN: No, Your Honor. There were a
21 couple of minor changes which the parties have agreed to,
22 subject to the Court's approval, of course.

23 THE COURT: But let's first talk about the more
24 significant issue. That is the italicized language. I want
25 to know what the course of that is.

1 case, I actually printed it out, plaintiffs propose a
2 state-law-created damage claim. I will hear you, but I
3 don't see it here. Ms. Sulton, or whoever is going to argue
4 this, it is at Page 20.

5 MS. SULTON: Your Honor, it is our position that
6 the conduct of the officers, whether it be the point at
7 which Mr. Whitehead allowed someone to take his car or
8 Officer Ciritella stepping out into the way of this vehicle,
9 that they created the situation where they then turn around
10 and say, okay, he now is this very, very dangerous felon who
11 has now attempted a murder on Mr. Ciritella. And we would
12 like an instruction, the one we found that was closest was
13 the state-created danger instructions.

14 THE COURT: Did you look at the facts of Kneipp?
15 Do you want to tell me what the facts of that case are?

16 MS. SULTON: I am not familiar with the specific
17 facts of that case.

18 THE COURT: Didn't you cite to it?

19 MS. SULTON: Yes, I did.

20 THE COURT: I am sorry. That is cited in the
21 defendants' objection.

22 MS. SULTON: I was using the Third Circuit model
23 that I took off the Internet, off their website, Your Honor.
24 I recall the Court telling me previously --

25 THE COURT: Kneipp v. Tedder provides a good

1 entitlement, other than the fact that it exists in the model
2 instructions, why you think the facts of this case warrant a
3 state-created danger doctrine instruction.

4 MS. SULTON: Well, it is our view, Your Honor --
5 and we were trying to get the model instruction that we
6 thought was closest to the facts of this case. There is
7 evidence before the jury that Mr. Whitehead left his car in
8 a position where a person who was mentally ill was able to
9 take it and drive off, and that creates the chain of events
10 that leads us, then, to the Fifth and Harrison Street
11 incident.

12 And then we have this testimony about Mr.
13 Ciritella positioning himself so that he now is in a zone of
14 danger for arguably this car hitting him. And it is our
15 position that to say that the escaping, or the actions of
16 the person creates the justification for him now being
17 identified as this very dangerous felon is simply, is not
18 the case.

19 So we wanted an instruction that would allow the
20 jury to take that into consideration. And as I looked at
21 what was available, this was the only instruction that I
22 found on the Third Circuit's website.

23 THE COURT: Let's for a moment suppose that the
24 Third Circuit website didn't exist. Why would you think the
25 Court should instruct along these lines?

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1 recitation of the so-called state-created danger doctrine
2 and a good discussion of that issue. You haven't had a
3 chance.

4 MR. CROSSE: I am not familiar with the facts of
5 that.

6 MS. SULTON: I just don't recall it offhand,
7 Your Honor.

8 THE COURT: Mr. Parkins, do you want to discuss
9 this?

10 MR. PARKINS: The Kneipp case, as I recall, says
11 that the state-created danger doctrine arises under the 14th
12 Amendment. This has never been pled in this particular
13 case. As the Court is aware, it has a long time ago
14 dismissed all of the plaintiffs' 14th Amendment claims. To
15 sort of raise it at this late hour when it should have been
16 something which should have been in the initial pleading
17 seems way too late and something which is unfair. The facts
18 giving rises to it have been known -- if there are any
19 giving rise to it, have been known to the plaintiffs for a
20 long, long time.

21 I don't recall sitting here today as to the
22 specific facts of the Kneipp case except that I do recall

23 reading, when I read the case, that they were clearly
24 different than what is presented here.

25 THE COURT: Tell me why you think there is an

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1 MS. SULTON: The way the 1983 federal claim is
2 written, and the emphasis of many of these, or at least some
3 of the instructions, is on the issue of what can an officer
4 do if a felon is escaping. But if it is the officer's
5 actions that allegedly create, or arguably create the
6 felony, then that's something that the jury should consider.
7 It's not like we have a situation with a bank robber
8 fleeing, what the officers classify is a bank robber, so he
9 knows he is chasing a fleeing felon.

10 What we have is someone who is using a police
11 car in an unauthorized manner. He doesn't have the right to
12 do that. And then they are saying, okay, now the felony
13 begins because he is trying to run over Ciritella.

14 THE COURT: No. With respect, Ms. Sulton, it
15 seems to me that the -- one could interpret the facts that
16 way. But one could also interpret, this jury could, there
17 is evidence from which it could conclude that the officers
18 were in fact chasing a fleeing felon.

19 MS. SULTON: Because of the car itself?

20 THE COURT: There was an attempted carjacking o
21 the gentleman in the Mercedes, which Officer Whitehead
22 witnessed. Am I wrong about that? He witnessed that. Now
23 then there was the actual taking -- the word carjacking is
24 used, for some curious reason -- there was a taking, which
25 the statute calls carjacking, of Officer Whitehead's car.

1 of Harrison Street, we know that Officer Kurten is,
2 according to his testimony, some 12 or 17 feet behind the
3 car, so we know that he is not in any danger. We know that
4 Officer Dempsey is on the driver's side of the car, perhaps
5 slightly behind it. So we know he is not in any danger. We
6 know that Officer Ciritella is walking along the passenger
7 side of the car shooting out those windows, so we know that
8 he is not in any danger. We also know that they had not
9 exhausted all of the avenues, or all of the means of
10 apprehension that were available to them because we know,
11 based upon the testimony of Lieutenant Fioravanti as well as
12 Heather Brown Pierson, that they were right there, just
13 right about the top of Sixth Street. We know that there are
14 other officers around.

15 So if we were to place in the balance whether or
16 not it was reasonable on September 13, 2003, to shoot 31
17 bullets at Mr. Smith, endangering both him and others in the
18 immediate vicinity, when we look at that issue, we know that
19 it is not reasonable for an officer in similar circumstances
20 to so do.

21 And you have the guidance of Mr. Stine, given
22 his credentials and experience, to help you understand the
23 facts in that regard.

24 Let me end by saying that we know that there are
25 difficult challenges that the police face. We want them to

1 When this case is, this trial is stripped of its
2 rhetoric and we examine the evidence in this case, it
3 becomes pretty straightforward.

4 The police did what they could to allow this
5 matter to come to a nonviolent end. Indeed, it is
6 undisputed that they began to fire their weapons only after
7 Harry Smith, III began to accelerate in the direction of
8 John Ciritella.

9 You have heard the evidence about how the stolen
10 police car, once it passed John Ciritella, crashed into the
11 parked Jeep Cherokee. That is undisputed. And it's
12 undisputed that the stolen police car, after it crashed into
13 the Jeep Cherokee, accelerated up Harrison Street. And it's
14 undisputed that Harry Smith, then, once he became free of
15 the Jeep Cherokee, continued to drive up Harrison Street.

16 As he drove up Harrison Street, there were two
17 things that were evident to these police officers. Number
18 one, Harry Smith, III, was willing to take a life, and
19 number two, Harry Smith, III would stop at nothing to avoid
20 apprehension by the police.

21 These defendants had no choice but to stop him
22 at that time.

23 I thought today I would briefly review the
24 important evidence with you, and then I would talk with you
25 about how it is that the jury instructions apply to this

1 aggressively protect our rights, our children, our lives.
2 But we also want them to follow the law. And they were
3 trained. They had rules and regulations to follow. They
4 chose not to do that. And when I asked Mr. Ciritella -- and
5 let me go directly to the trial transcript so that I don't
6 misquote him -- when I asked Mr. Ciritella whether or not he
7 was bound by the rules, he said -- and let me just find that
8 particular piece of paper, and I am going to put it up here
9 on the little screen so that you can see it -- I asked him,
10 and this is on Page 759 of the trial transcript, at Line 13:

11 "Are you bound by the requirements of the use of
12 deadly force policy as articulated in the police officers
13 manual?"

14 And he said, "No, ma'am."

15 None of us are above the law. And what occurred
16 is in broad daylight, in a densely populated neighborhood,
17 while children played on the street and elderly people sat
18 in front of their home in chairs enjoying the afternoon,
19 with 31 bullets flying throughout their neighborhood at a
20 man who could have been apprehended if officers had been
21 reasonable in their approach to their duties.

22 Thank you.

23 THE COURT: Thank you, Ms. Sulton.

24 Mr. Parkins.

25 MR. PARKINS: Good afternoon.

1 evidence. And then finally I will briefly review with you
2 the verdict form which Judge Sleet has given you to complete
3 at the end of your deliberations.

4 Let's begin with the evidence.

5 At Washington Street, you have heard the
6 officers call "Send backup, send backup. Shots fired, shots
7 fired. He has got the car, he has got the car."

8 This is certainly not, as Joseph Stine seemed to
9 describe it, a lark by Harry Smith, III. You have heard
10 about the pursuit, about the erratic driving, about the fact
11 that he went the wrong way on Seventh Street and how cars
12 had to pull to get out of the way. About how he made the
13 wide turn onto Fourth Street and went into the eastbound
14 lane when he was heading west.

15 You heard the testimony about how he ran stop
16 signs on Monroe Street. You have heard testimony about how
17 he ran two red lights, one at Jackson Street and the other
18 at Adams Street, which are both major intersections here in
19 the City of Wilmington, intersections which funnel traffic
20 off of I-95 or onto I-95.

21 Let's focus, if we could, on the evidence about
22 what happened at Fifth and Harrison Street. It is

23 undisputed -- we have heard lots of evidence about the fact
24 that Harry Smith, III on this day was suffering from some
25 recent onset of mental problems. But there is not one piece

1 of evidence that these gentlemen knew about that.
 2 What they knew about was that there had been an
 3 incident involving shots fired and that there had been a
 4 semi-wild chase through the City of Wilmington which brought
 5 them to Fifth and Harrison Street.

6 It is undisputed that the police shouted at Mr.
 7 Smith, "Stop the car, stop the car. Get out of the car."
 8 There is not one resident -- and remember, according to
 9 plaintiffs, the streets were crowded with people, and they
 10 brought not one resident here to dispute that. And indeed,
 11 you remember David Gwyn? David Gwyn testified that his
 12 curiosity was first aroused when in his words he heard some
 13 hollering down on Fifth and Harrison Street. That hollering
 14 was John Ciritella yelling, "Get out of the car, stop the
 15 car."

16 It is undisputed that the officers here did not
 17 fire their weapons until after Mr. Smith drove at Detective
 18 Ciritella.

19 Once again, the streets are crowded with people.
 20 And the plaintiffs have brought you no one to dispute what
 21 these police officers and other police officers told you.

22 There is no dispute, really, that Mr. Smith
 23 drove directly at Officer Ciritella. You have heard police
 24 officer after police officer who was there say, I saw him
 25 drive directly at John Ciritella. I asked them about what

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1 did you think about Detective Ciritella's prospects, and
 2 they said things like, I thought he was going to die, I
 3 thought he was going to be run over.

4 Once again, the streets are crowded with people,
 5 and the plaintiffs have brought you no one to dispute what
 6 happened there.

7 And you heard the testimony of John Nordsby, the
 8 forensic scientist, who told you that the physical evidence
 9 is consistent with what Detective John Ciritella told you.
 10 Now, the plaintiffs have attempted to disparage Dr. Nordby.
 11 They refer to the fact that he had a Ph.D. in philosophy.
 12 Well, he told you in his deposition testimony, in his video
 13 deposition, that the reason he had a Ph.D. in the philosophy
 14 of science was because when he went to school there were no
 15 course offerings in forensic science. So he had to take
 16 that.

17 Dr. Nordby's curriculum vitae, or his resume, is
 18 one of the exhibits that we have sent back or will send back
 19 to you. If you are curious, you can take a look at it. You
 20 will see that Dr. Nordby is a Phi Beta Kappa. He is a
 21 Diplomat of the American Board of Medical Death
 22 Investigators. He is on the board of the American Academy
 23 of Forensic Sciences. He has published books. He has
 24 written papers. He has given lectures and instruction to
 25 police departments around the country, and to medical

1 examiners around the country.

2 He is, indeed, one of the premier experts in the
 3 world on what we are talking about.

4 It is undisputed, of course, that after Mr.
 5 Smith attempted to -- appeared, at least, to be attempting
 6 to run down Detective Ciritella, that he hit the Jeep
 7 Cherokee. At one point in time the plaintiffs suggested
 8 that, well, it must not have been a high-speed crash because
 9 there was no air bag deployment. But Dr. Nordby told you
 10 that the airbags -- the sensors on the stolen police car
 11 were not impacted. So the absence of air bag deployment on
 12 the stolen police car meant nothing as far as what the speed
 13 of the car was when it hit that Jeep.

14 But we do know that the police car after hitting
 15 the Jeep accelerated. John Ciritella told you that when he
 16 was standing on the corner, he heard tires screaming and he
 17 smelled rubber burning. And there is physical proof of
 18 that. That is the photographs on the street with the
 19 acceleration tire marks left there by Vehicle 1180.

20 Then the plaintiffs claim that these defendant
 21 officers shot at the car after it stopped. And they have
 22 provided to you two pieces of evidence. One is the
 23 testimony of David Gwyn. And the other is the testimony of
 24 Reverend Bernard Thompson.

25 You may recall that in my opening statement to

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1 you I told you that there would be only one person who would
 2 testify that they saw the police car being shot at after it
 3 stopped. Well, Judge Sleet in his instructions has told you
 4 that Reverend Thompson's testimony became known to the
 5 parties and to the Court only after the trial started, and
 6 that I was not being disingenuous or fooling you when I said
 7 there was only one person who would testify that way.

8 Let's look at the testimony of Mr. Gwyn for a
 9 second.

10 Mr. Gwyn didn't even see John Ciritella. He saw
 11 three uniformed officers which he claimed were running down
 12 from the west side of Fifth Street. Mr. Gwyn didn't even
 13 see the police cars blocking Fifth Street. He claimed that
 14 he saw 1180 simply come around the intersection in the
 15 street and then crash into the parked Jeep Cherokee.

16 But most importantly of all, Mr. Gwyn has told
 17 three different stories. **B-093**

18 You heard how he told Detective Lieutenant
 19 Browne, who interviewed him that very night, that he saw on
 20 officer firing five or six shots. Then you heard how he
 21 signed an affidavit, which the plaintiffs filed earlier in
 22 this lawsuit, in which he said he saw a police officer walk
 23 up to the side of the police car, and he described it as the
 24 driver's side of the police car, and shoot into the body of
 25 the driver. Well, there is a problem with that. And

1 apparently Mr. Gwyn must have sensed it or somebody did,
2 because the problem is that the fatal shot, according to the
3 description being given by Mr. Gwyn, would have hit Mr.
4 Smith on this side of his head, the side of his head towards
5 the driver's side. The fatal shot was on this side.

6 So, apparently sensing that, Mr. Gwyn told yet a
7 third story, this time in his deposition. And in his third
8 story, he told you, or told us, and told you here, that the
9 car had stopped and he saw the police officers continue to
10 shoot at the car after the car had stopped.

11 Now, either of those last two stories seems to
12 me to be pretty remarkable. It would seem to me that to
13 have seen police officers either walk up and shoot him after
14 the car had stopped or to shoot from behind after the car
15 had stopped would be a pretty horrific sight.

16 We asked, when his wife was testifying, we asked
17 her, did you and your husband talk about this event? Now,
18 what do you think -- and she said yes. Doesn't your common
19 sense tell you, if they had talked about this event, Mr.
20 Gwyn would have told her about these horrific events that he
21 claims to have seen? And doesn't your common sense tell you
22 that if Mrs. Gwyn had heard that, she would have remembered
23 it?

24 But when we asked Mrs. Gwyn, do you remember
25 your husband ever saying that he saw a police officer walk

1 inappropriate for a lawyer to talk to a witness about his or
2 her testimony while the witness is being examined or
3 questioned by an opposing party. And Judge Sleet will tell
4 you that you may infer, if you choose to do so, that Ms.
5 Sulton was attempting to coach Reverend Thompson about his
6 testimony. You may recall, when we had on the Elmo here the
7 drawing which we had Reverend Thompson make, that there wer
8 X's placed on that drawing for the correct position for the
9 police officers, and those X's were drawn by Ms. Sulton.

10 There are yet more problems with Reverend
11 Thompson's testimony.

12 First of all, he said he didn't see Detective
13 Ciritella, either. Recall that Detective Ciritella was in
14 plain clothes that night. Reverend Thompson told you that
15 he saw only uniformed officers. Then Reverend Thompson told
16 you about how it is that he was in front of his house. He
17 saw two police cars go speeding down Van Buren Street. He
18 lived in the 600 block of Van Buren. He saw two police cars
19 go speeding down. And he went around the corner and he
20 heard gunshots down there. So he gathered up his
21 grandchildren, five or six of them, and herded them back
22 towards his house to safety on Sixth Street, and then went
23 back out again and looked down and saw the police shooting
24 at the stopped police car.

25 Well, this makes no sense, for two reasons. One

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1 up to the side of the car and shoot into the body of Harry
2 Smith, she said no.

3 When we asked Mrs. Gwyn, do you ever remember
4 your husband ever saying to you he had seen police officers
5 shooting into the back of the car after it stopped and the
6 man was stumped slumped over the wheel? She said no.

7 Doesn't your common sense tell you that she
8 would have remembered that if her husband had ever told her
9 that? And doesn't that mean to you he never said anything
10 to her about it?

11 And then finally, doesn't that mean to you he
12 never saw it?

13 Let's talk about Reverend Thompson for just a
14 moment. Reverend Thompson has all kinds of problems with
15 his testimony. First, he has the wrong position of the
16 officers. According to every other piece of physical
17 evidence, the position he has drawn is wrong. Now, you may
18 recall that during the course of his testimony, we brought
19 out that -- we had had a deposition the night before or two
20 nights before, and during a break in the deposition, I and
21 my colleagues left the room to confer for a moment, leaving
22 Reverend Thompson and Ms. Sulton together. And during that

23 break, Ms. Sulton and Reverend Thompson talked about the
24 case and about his testimony.

25 Well, Judge Sleet has told you that it is

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1 is, what sane man would stick his head out or his body out
2 from behind safety to watch police shooting up the street
3 just as a matter of curiosity? And also, it makes no sense
4 because the officers, and every one of them has told you
5 that the entire incident at Fifth and Harrison took between
6 five and ten seconds. Not enough time for Reverend Thompson
7 to have heard the shooting, seen what was going on -- he
8 said he saw the car down there -- herd his grandchildren
9 back, and then walk back out again.

10 There is still more. He said he saw two police
11 cars coming down the street and park in front of the stolen
12 police car as the officers on foot continued to shoot at the
13 car. You heard the testimony from Detective Gifford and
14 Officer Heather Brown Pierson, who were in one car, and you
15 heard the testimony from Sergeant Fioravanti. All of them
16 testified, they did not arrive and see the scene until after
17 the shooting had stopped. **B-094**

18 And yet Reverend Thompson would have them down
19 half a carlength in front of the stolen police car while the
20 defendants are allegedly shooting at the stolen police car.

21 And that raises the next thing. Does it make
22 any common sense whatsoever to think, as Reverend Thompson
23 has told you, that these police officers would shoot at the
24 stolen police car when just a half a carlength beyond it was
25 a police car occupied by their brother officers? No.

1 Then Reverend Thompson told you about seeing the
2 officers after the event was over high-fiving and
3 celebrating and laughing. David Gwyn didn't see that.
4 David Gwyn didn't tell you anything about high-fiving and
5 celebrating and laughing. What he told you about were
6 police officers trying to do CPR on Harry Smith.
7 And then, maybe most curious of all, Reverend
8 Thompson did not tell the police about what he had seen for
9 six months, nothing. Don't you suppose that if you had seen
10 what he describes having seen that you would tell somebody
11 right away? And, in fact, he told you that he talked with
12 Heather Brown Pierson that very night while she was doing
13 traffic control. And he didn't tell her. He waited for six
14 months.
15 And when he did talk to Lieutenant Browne, he
16 told him things that were not believable. He told him
17 things about the position of these officers which in
18 Lieutenant Browne's mind were entirely inconsistent with the
19 physical evidence in this case. There were no bullet
20 strikes on the right side of the car, and yet Reverend
21 Thompson said he saw a police officer shooting at the right
22 side of the car.
23 There were no shell casings in any proximity to
24 where he placed the officers.
25 His testimony is simply unbelievable.

1011

1 Well, let's look, if we could, at what the
2 physical evidence is.
3 The physical evidence has at least one advantage
4 over human beings. The physical evidence doesn't get
5 confused and the physical evidence does not lie. And the
6 physical evidence in this case shows beyond any doubt that
7 the car was moving when John Ciritella fired the fatal shot.
8 You heard the testimony of John Nordsby, the
9 forensic scientist, about the fact that the physical
10 evidence shows that, number one, the car was moving, and
11 number two, that Mr. Smith was sitting upright and looking
12 ahead when he was shot in the head.
13 I want to show you exactly what Dr. Nordby was
14 saying when he said the car was moving.
15 (Video played.)
16 This is a rather crude diagram, but I think it
17 will serve the purpose. You heard the testimony from Dr.
18 Nordby that the shot that hit Mr. Smith in the head came
19 from 3:00. If I am looking at Judge Sleet, he is at noon
20 and you folks, of course, are at 3:00. And the shot came
21 from 3:00. And you heard, also, from the medical examiner
22 that the shot went into this part of his head and went
23 almost straight, on a straight course through part of Mr.
24 Smith's brain, which means that Mr. Ciritella would have
25 been in this position when he fired the shot which hit Mr.

1 Smith in the head. And by the way, there are bullet strikes
2 and other wounds which would be consistent with this
3 position, as Dr. Nordby said.
4 You also heard how it is that John Ciritella's
5 .40-caliber Smith & Wesson injects its shell casings to the
6 right and slightly to the back, which means that the shell
7 casings which he fired, which we, by the way, you may
8 recall, we measured 30, 31 and 32, those numbers, would hav
9 been right here to John Ciritella's right.
10 Now if, in fact, the car was stopped when he was
11 shooting, this is where you would have found the car, and
12 this is where you would have found the shell casings. But
13 instead, this is where the car was found.
14 There is only one conclusion that you can draw
15 from this, and that is that after John Ciritella fired these
16 shots, the car continued to move, which means the car could
17 not have been stopped when they fired those shots.
18 Then there is the issue of the expert witnesses,
19 in particular, the plaintiffs called two, Elbert Waters and
20 Joseph Stine.
21 I would like to, if I could, point out some of
22 the inconsistencies between their testimony. I wish I were
23 tall enough to write up at the top.
24 Joseph Stine said, for example, no roadblock.
25 On the other hand, Elbert Waters said, a

1013

1 roadblock was a good plan.
2 Joseph Stine said, should not have tried to
3 apprehend Mr. Smith. Elbert Waters said, the police needed
4 to apprehend him.
5 Joseph Stine said that John Ciritella should
6 have stayed behind the building, and for a short phrase I
7 will say "hide," and let the police officers from behind do
8 the felon stop. Well, you did hear, by the way, the police
9 officers from behind started to do a felon stop and at that
10 point in time Mr. Smith drove away.
11 Elbert Waters says something entirely different.
12 He said that John Ciritella should have come out into the
13 street, "Stop, stop, stop," and then, if needed, proceed to
14 use deadly force.
15 We have all seen at one time or another TV shows
16 or movies where one of the characters has a little devil and
17 an angel on his shoulder and the devil is telling the
18 character something and the angel is telling the character
19 something else, and I sometimes wonder what would have
20 happened to John Ciritella if he had had little miniature
21 Elbert Waters on one side and a miniature Joseph Stine on
22 the other and Mr. Waters saying, roadblock, roadblock, and
23 the other one saying, no, no, no. Who knows what would have
24 happened?
25 All right. I will just mention a few things

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1 that Joseph Stine told you and ask you whether these make
2 any sense at all.

3 He told you during his trial testimony that
4 maybe what could have happened, as far as these gentlemen
5 were concerned, was that maybe they had gone from a lunch
6 break and then they came back to their car and they found
7 Mr. Smith in it driving away. Well, you heard the radio
8 call from Johnny Saunders, the police officer who was there.
9 Does that sound to you like a situation in which officers
10 came back from a lunch break and saw somebody driving away
11 in their car? Of course not.

12 And then Joseph Stine told you, well, one of the
13 things that the Wilmington Police could have done was to
14 call Action News and get Channel 6 to send its helicopter
15 down here from Philadelphia. Does that make any sense at
16 all? No.

17 On the other hand, you heard from Ron Traenkle.
18 Ron Traenkle teaches law enforcement agencies around the
19 country, and he teaches them about a number of things,
20 including the use of deadly force. I will ask you, did Ron
21 Traenkle's testimony make sense to you? Did he advocate
22 calling Action News and asking for the use of their
23 helicopter? No.

24 I would like to mention just a little bit about
25 some sort of miscellaneous evidence that came through here.

1015

1 One is about the so-called MVR, the mobile video recorder.
2 The fact is, it wasn't working. You heard the testimony
3 that the Wilmington Police had so much difficulty with the
4 MVRs in their police cars that they got rid of them. There
5 are no longer mobile video recorders in any Wilmington
6 Police car because they just weren't reliable.

7 And there is evidence, of course, that this one
8 was not working.

9 Ms. Sulton told you in her opening statement and
10 repeated that when she got a copy of the tape that was at
11 1180, it was a blank tape. Well, it's not a blank tape.
12 You may recall having seen it, and every once in a while
13 there would be a snippet of a scene. And what that meant
14 was that it was working sometimes and not working others.
15 And then finally -- not finally, but if you were to play
16 this tape through in the jury room during your
17 deliberations, you will hear, but not see, an officer
18 complaining that he can't get it to work. There is audio
19 but there is no video.

20 Finally, insofar as the MVR is concerned,
21 Lieutenant Browne, who was the chief investigator in this
22 case, told you that when he looked at the tape, he could
23 find recordings for September 10, 11, 12, and 9 in this
24 order on the tape. Seems peculiar. But there is a logical
25 explanation, if you think about it. At one time, in all

1 likelihood, this tape contained 6, 7, 8, 9. September 6, 7,
2 8, 9. When it got to 9, it got near the end of the tape and
3 it rewound, and started recording the 10th, the 11th and
4 12th, and sometime on the 12th it broke. And that's why you
5 have 10, 11, 12 and 9.

6 One other thing. Think about this. If there
7 was some incriminating evidence on that tape, we would not
8 be able to erase the 13th. You wouldn't have the 9th on
9 there because it would have erased everything on that tape,
10 not just the 13th, it would have erased anything on that
11 tape. So it was impossible to erase part of the tape so
12 that you would have 10, 11, 12 and 9.

13 In other words, it just was not working on the
14 13th.

15 There was a lot of discussion about policies. I
16 won't go through them again because I know you have heard i
17 probably more than you care to. But I will say a few
18 things.

19 Number one, 3.2, which you have heard already,
20 is for roadblocks and applies to the Traffic Division.
21 These gentlemen and the other gentlemen who were in the
22 pursuit, and the ladies in the pursuit, were not in the
23 Traffic Division.

24 6.7 says you can't shoot at a moving vehicle
25 except under exigent circumstances. And you heard when Joh

1017

1 Ciritella explained to you why this was an exigent
2 circumstance and why he was permitted under the policy to
3 shoot at a moving motor vehicle.

4 And 6.7 regulates the use of deadly force. And
5 you heard John Ciritella explain to you why 6.7 allowed him
6 to use deadly force.

7 Then you heard about shotguns and patrol cars.
8 And I assume that this is because the plaintiffs want you to
9 believe it was unreasonable for these gentlemen to
10 anticipate the likelihood that there was a shotgun in the
11 patrol car. And you heard about the 1995 policy, which
12 hasn't been changed since then. But you heard that it was
13 sometime after 1995 that the police began to purchase patrol
14 cars with shotgun racks.

15 Now, does it make any sense if they would
16 purchase Crown Victorias with optional shotgun racks in the
17 front part and then require the police to put them in the
18 trunk? No.

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19 You heard about Johnny Whitehead testified he
20 was trained to put the shotgun in the front. And you heard
21 about the fact that the shotgun racks that go behind the
22 police officers' heads is -- sometimes they don't function
23 very well and a shotgun will come tumbling forward.

24 These police were entirely reasonable in
25 anticipating that 1180, like most patrol cars, had a shotgun

1 somewhere in the front seat.

2 Then you heard about 6.8, which is the do no
3 blocking, cutting off, or ramming. You heard John Ciritella
4 say that when he placed his patrol car there, it was neither
5 blocking, cutting off, or ramming, as defined by that
6 particular policy. And he said, even if it was the policy,
7 it permits officers to do so in exceptional circumstances,
8 and this was an exceptional circumstance.

9 Finally, today, you heard Ms. Sulton talking to
10 you about the unholster policy. No expert came here and
11 said that it was inappropriate for the defendants to
12 unholster their weapons. And you heard about how they can't
13 unholster except if there is a threat in the immediate
14 vicinity. But there was one in the immediate vicinity. It
15 was right in front of him.

16 I would like to take just a moment or two to
17 relate the instructions to what the evidence clearly shows
18 in this case. The really important instructions are found
19 in Page 13 and Page 14.

20 The first one I would like to talk to you about
21 for just a moment is, Judge Sleet has told you that, "A law
22 enforcement officer may use deadly force to prevent escape
23 by a fleeing suspect when the officer has probable cause to
24 believe that the fleeing suspect poses a threat of serious
25 physical harm, either to the officer or to others."

1019

1 Here is what John Ciritella and Cliff Dempsey
2 and Matt Kurten knew on September 13 at the time that they
3 began to use deadly force.

4 They knew that the suspect had been involved in
5 an incident on 14th and Washington Street in which shots
6 were fired. They knew that the suspect had obtained
7 possession of a police car from two armed policemen. They
8 knew that in all likelihood there was a shotgun in the front
9 seat. They knew about the possibility of this person being
10 armed with a knife. They knew about the fact that he had
11 driven erratically, driving through red lights and things of
12 that nature, on the street. And most importantly of all,
13 they knew that the suspect had attempted or appeared to have
14 been trying to run down Detective Ciritella.

15 Under those circumstances, no reasonable person
16 would conclude anything other than the suspect poses a
17 threat of serious harm to others if he were allowed to
18 escape.

19 The next instruction which is important here is
20 that, "you should consider all of the relevant facts and
21 circumstances leading up to the time of the attempt to
22 prevent the escape and apprehend Mr. Smith that the

23 defendants reasonably believed to be true at the time."

24 We have spent the last week and a portion
25 together dissecting what happened. But it is important to

1 keep in mind, even if you believe that, gee, if I had been

2 Officer Ciritella, I might have, instead of backtracking, I
3 might have turned and run, or something along those lines,
4 but it is important to know that this situation is to be
5 judged through their eyes and through what they reasonably
6 believed at this time.

7 I believe you will find that they, through their
8 eyes, reasonably believed this was a deadly situation in
9 which John Ciritella's life was at stake and later the
10 people of the City of Wilmington.

11 The next one that is important is, "In
12 determining whether the defendants' acts were reasonable,
13 you must consider that a police officer is often forced to
14 make split-second judgments under circumstances that are
15 sometimes tense, uncertain and rapidly evolving."

16 None of us, so far as I know, has ever been in a
17 situation like that faced by John Ciritella that night.
18 None of us has had to stare death face-to-face from a
19 carlength-and-a-half away.

20 None of us had a split-second decision, do I
21 backtrack? Do I shoot my weapon? What do I do?

22 And the law takes into account that as John
23 Ciritella and Matt Kurten and Cliff Dempsey were out on that
24 street, they didn't know what was going to happen next.
25 They had to make split-second decisions.

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1 Now, finally, Judge Sleet has given you some
2 factors which you can consider in making your determination
3 whether these officers acted reasonably.

4 You can find those, I believe, on Page, I think
5 it's 16 of your instructions. I am sorry. You will find
6 them on Page 15 of your instructions.

7 There they are, the severity of the crime at
8 issue, those factors.

9 What we thought we would do here is summarize
10 what was known to these people at this time.

11 First, the severity of the threat. Officer
12 Ciritella thought he was going to die. Killing a police
13 officer, as you heard him say, while he is about his duties
14 is murder in the first degree in this state. And attempting
15 to kill a police officer is attempted murder in the first
16 degree.

17 Now, keep in mind, I know that the plaintiffs
18 will say, well, Harry Smith, III was mentally deranged. But
19 that wasn't known to John Ciritella at that time. And even
20 if it were known, John Ciritella would have had the right to
21 shoot to protect his own life.

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22 Secondly, the threat. We know from what these
23 officers knew that it appeared that Harry Smith, III was
24 willing to take a life. And we also know that he would stop
25 at nothing to avoid apprehension. After all, he rammed into

1 a parked Jeep in an effort to get away.
2 How about the possibility he was armed? If you
3 listened to the tape, you will hear the dispatcher say the
4 man was armed with a knife. Turned out to be a scalpel.
5 And you know that it was found in the car.
6 Number two, he was possibly armed with a
7 shotgun.
8 And then finally, and most importantly of all,
9 and I will put this as my number one, the car was a deadly
10 weapon. And he used it that way.
11 What about resisting or evading? Was he
12 resisting or evading arrest? Well, I will tell you what. I
13 will tell you what the plaintiffs' expert had to say about
14 that when they were here before you.
15 Mr. Waters said, I asked him, At any time during
16 this incident did it appear that Mr. Smith was trying to
17 avoid arrest by flight? And he said, I would say yes.
18 When?
19 At the point he was coming down the street on
20 Fifth.
21 And Joseph Stine said, I asked him, Would you
22 agree, Mr. Stine, with us that when Mr. Smith drove down
23 around the barricade it was reasonable for the officers at
24 the scene to conclude that he was trying to escape?
25 The answer: Yes.

1023
1 So plaintiffs' own experts established that for
2 us.
3 The duration of the defendants' actions. The
4 only testimony as to how long this took was five or ten
5 seconds. So I am going to put on here ten seconds. This is
6 not a situation where they had that chance to organize
7 another blockade. This is not a situation where they could
8 say, let's call out the SWAT team or let's call out some
9 other team. They had ten seconds, split-seconds in which to
10 do what they had to do.
11 And then finally, the next thing is whether
12 physical force applied to such an extent as to lead to
13 unnecessary death or injury.
14 What were the officers' alternatives? No
15 beanbag gun. It wouldn't have worked anyway, he is in the
16 car. No taser. Didn't have one. But it wouldn't have
17 worked anyway, he was in a car. No spike strips. You heard
18 the plaintiffs' expert say that you can't shoot to warn.
19 You heard the plaintiffs' expert say you can't shoot the
20 tires out.
21 And then you heard that they saw no one up ahead
22 who would have apprehended Mr. Smith if they had let him go.
23 We have heard a lot of testimony about officers
24 coming to the scene, but every one of them got there after
25 the shots had been fired. There is not one bit of evidence

1 that there was an officer on the scene who these officers
2 were in a position to see who could have apprehended Mr.
3 Smith if they had let him go.
4 And then, ask yourself this question: If they
5 had let him go, would the officer, some unknown officer up
6 Harrison Street, have had the same problem and been at the
7 same risk as John Ciritella?
8 We respectfully suggest to you that the evidence
9 is overwhelming that the factors that you can consider show
10 beyond any doubt, really, that the officers behaved
11 reasonably and responsibly in this particular instance.
12 What I would like to do to finish is to just
13 briefly show you the verdict form, which I am not certain if
14 the Court has distributed to you yet, but it will if it
15 hasn't shortly.
16 The verdict form, as you may or may not know, is
17 a series of questions which you are to answer. Now, I don't
18 want presume to tell you how to do your job. But I do want
19 to show you how we believe you should answer the jury
20 verdict form if you agree with our position and our views of
21 the evidence.
22 The first question relates to the constitutional
23 claim. That is what I just described for you just a second
24 ago.
25 And it asks you, Do you find by a preponderance

1025
1 of the evidence that any of the defendants used excessive
2 force and deprived Harry Smith, III of his rights under the
3 United States Constitution or the Delaware Constitution?
4 The Delaware Constitution, for all intents and
5 purposes here, is one and the same as the United States
6 Constitution. And Judge Sleet has not told you that there
7 is a different test somehow for the Delaware Constitution.
8 And if you agree with us that John Ciritella and
9 Cliff Dempsey and Matt Kurten had no choice but to do what
10 they did, then we suggest that you should answer, or check
11 no to these.
12 The next question that you would be directed to
13 go to in this instance is to go to Question 3, if you see
14 the instruction down here.
15 Question 3 talks about the wrongful death of
16 Harry Smith. And under state law you must find two things
17 before you can find for wrongful death. First. You must
18 find that these officers used excessive force. And for the
19 reason I have just told you about for the last several
20 minutes, they haven't. But even if you find that, you must
21 find, must determine whether they acted maliciously or
22 wantonly. And those terms are defined for you in the
23 instructions which Judge Sleet gave to you.
24 You don't need to reach that determination if,
25 in fact, you find that the officers did not use excessive

1 force. And so we suggest to you that the appropriate
2 answers to this question are also no.
3 Now, if you in fact reach those same conclusions
4 that we urge you to, then your job with the questionnaire is
5 finished.
6 However, if you were to find that one or more of
7 the defendants is liable -- and by the way, as the Judge has
8 told you, the fact that one is liable doesn't mean they are
9 all liable -- then you must answer some questions at the
10 end, which I can't show you because I wrote notes on them.
11 The questions at the end are Question 8, which says, Do you
12 find by a preponderance of the evidence that -- do we have
13 another verdict form?
14 THE COURT: They have it in front of them, Mr.
15 Parkins.
16 MR. PARKINS: I am sorry. I didn't know they
17 had been distributed.
18 The question at the end is, Do you find by a
19 preponderance of the evidence that John Ciritella was not
20 placed in danger by Harry Smith, III?
21 If you find that the plaintiffs, even though
22 they have produced no witnesses to dispute the story about
23 what John Ciritella said, if you find he was never in
24 danger, then you should check yes. If you agree with our
25 presentation that he was, then you should check no.

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1 Likewise, you are asked whether Harry Smith
2 presented a threat of serious injury to others. If you
3 agree with our presentation and our contentions, then you
4 should check no.
5 And then finally, if you agree with our
6 contention that the defendants did not continue to shoot at
7 the car after it stopped, then you should likewise check no.
8 Once again, you only need to answer these
9 questions if you find that one of the defendants is liable.
10 This case can be best perhaps summed up in the
11 testimony of two experts, Elbert Waters and Ron Traenkle.
12 Elbert Waters in his deposition, which was played for you in
13 part, told us this: What they should have done was just
14 jumped out front, since he had room to jump in front of a
15 parked car, there are plenty of parked cars along, at least
16 only six feet between a parked car and a curb, he should
17 have tried one more time, jumped out, waved his hands, stop,
18 stop, stop, and at that time proceeded to use deadly force.
19 Once again, he should have tried one more time, jumped out,
20 waved his hand, stop, stop, stop, and at that point
21 proceeded to use a deadly weapon.
22 That was their expert telling you what John
23 Ciritella should have done, and that's exactly what he did.
24 And then finally, the testimony of Ron Traenkle.
25 Ron Traenkle told you that it would have been a dereliction

1 of these officers' sworn duty to protect the citizens of
2 Wilmington for them to have let Harry Smith go.
3 Thank you so much for your time and your
4 attention.
5 THE COURT: Thank you, Mr. Parkins.
6 Ms. Sulton, your rebuttal.
7 Mr. Crosse, are you going to handle it?
8 MR. CROSSE: Yes, Your Honor. Could there be a
9 short break?
10 THE COURT: How long do you need?
11 MR. CROSSE: Five minutes.
12 THE COURT: We will take five minutes, ladies
13 and gentlemen.
14 (Jury leaves courtroom at 5:30 p.m.)
15 (Recess taken.)
16 THE COURT: Ms. McDavid, please bring in the
17 jury.
18 (Jury enters courtroom at 5:45 p.m.)
19 THE COURT: Ladies and gentlemen, please take
20 your seats. We will now hear the plaintiffs' rebuttal.
21 Mr. Crosse.
22 MR. CROSSE: Thank you very much, Your Honor.
23 Ladies and gentlemen, good afternoon. It is
24 almost good evening.
25 I, like other counsel before me, wish to say a

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1 word of thanks to each and every one of you for your time
2 and attention in hearing this case. It is an important case
3 to all the parties involved, particularly the plaintiffs.
4 There have been breaks and interruptions and in
5 and out. We really appreciate your patience in hanging in
6 there with us, because that is what happens in litigation.
7 These cases are not like in TV where they can be packaged
8 and ended in an hour, because unexpected things happen.
9 Documents have to be reviewed, et cetera.
10 So I again say thank you just in case I may
11 forget at the end of my presentation.
12 Now, you have heard a lot of stuff. It is
13 getting late in the evening. I ask you to bear with me in
14 that I am in the position of really having to advance a
15 position and, to use a fight analogy, to counterpunch for
16 some of the things that you have heard today.
17 Let me first just address that verdict sheet.
18 Of course, Mr. Parkins put it up on the Elmo or whatever.
19 And it's his position that you should answer no to those
20 questions. Of course, our position is that the answers
21 should be yes. I hope that I will be able to tell you why.
22 And I hope that you will use the answer that talks about
23 money. We need to discuss that. I wore my green tie today
24 So when you see this tie, think money, because it's
25 considered a dirty thing, but it is the way that justice is

B-099

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

HARRY SMITH, JR., and ROSLYN
WOODARD SMITH, individually and
as Administrators of the ESTATE
OF HARRY SMITH, III,

Plaintiffs,

v.

CITY OF WILMINGTON, JOHN
CIRITELLA, THOMAS DEMPSEY and
MATTHEW KURTEN,

Defendants.

No. 04-1254-GMS

COPY

Videotape Deposition Upon Oral Examination
of

JON J. NORDBY, PH.D.

Taken at 3532 Soundview Drive West
University Place, Washington

CONDENSED TRANSCRIPT

DATE: Monday, April 2, 2007

REPORTED BY: Ronald L. Cook
CCR, RMR, CRR



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14:10 1 was retrieved from Mr. Smith match the test bullet that --
 2 that you fired?
 3 A. Yes, both class and individual
 4 characteristics show that the bullet recovered from
 14:10 5 Mr. Harry Smith III was fired through that particular
 6 pistol.
 7 Q. Do you have an understanding who that pistol
 8 was used by?
 9 A. Yes. I was told that it was Officer
 14:10 10 Cirtella's pistol.
 11 Q. Thank you.
 12 Was this the bullet that was retrieved from
 13 Mr. Smith's brain?
 14 A. Yes, I believe so.
 14:11 15 Q. Okay.
 16 Would you take a look at Page 8 and tell us
 17 briefly what is there.
 18 A. Excuse me. Exhibit 8?
 19 Q. I mean Exhibit 8. I'm sorry.
 14:11 20 A. Yes. This, again, shows two -- two
 21 photographs. The top photograph compares a known with an
 22 unknown -- a known cartridge case fired through this
 23 particular pistol, Officer Cirtella's pistol, and an
 24 unknown item from Harrison Street, found at the scene. And
 14:11 25 again, these are firing pin impressions in the primer of the

14:14 1 determine the elements that are present in a particular
 2 sample, and x-ray fluorescence works particularly well on
 3 metals.
 4 Q. Were you looking for any particular elements
 14:14 5 in -- in this study?
 6 A. Yes. When a -- a cartridge is fired in a
 7 pistol such as Officer's Cirtella's pistol, a primer is
 8 struck by the firing pin and that primer initiates the burn
 9 for the gunpowder to fire the bullet through the pistol, and
 14:14 10 characteristically there's antimony, barium and lead in most
 11 primers, and one indicator of the proximity of a -- the
 12 discharge of a firearm to a particular target is the
 13 presence of antimony, barium and lead fused as one particle.
 14 Q. Did you find any evidence of antimony, barium
 14:15 15 and lead in the headliner of the car?
 16 A. No.
 17 Q. Did you similarly analyze the clothing worn
 18 by Mr. Smith at the time of this event?
 19 A. Yes, I did.
 14:15 20 Q. Did you find any antimony, barium or lead on
 21 his clothing?
 22 A. No, I did not.
 23 Q. What does the absence of such a finding tell
 24 you?
 14:15 25 A. Well, one has to be careful whenever one

14:11 1 cartridge, and the firing pin on a pistol will leave
 2 characteristic impressions that can be analyzed in terms of
 3 their class as well as individual characteristics.
 4 Q. Do you have an opinion as to whether the same
 14:12 5 weapon fired both of -- used --
 6 Excuse me. Do you have an opinion as to
 7 whether the shell casings were both fired from the same
 8 weapon?
 9 A. Yes, they were.
 14:12 10 Q. Okay.
 11 One last photograph to look at, please.
 12 I'm going to ask the reporter to mark as
 13 Exhibit 9, I believe, Page 4 from Part 7 of the appendix.
 14 (Deposition Exhibit 9 was marked
 14:12 15 for identification.)
 16 MR. PARKINS: Is that 9?
 17 THE REPORTER: Yes.
 18 Q. BY MR. PARKINS: Without any detailed
 19 scientific explanation, can you just briefly tell us what
 14:13 20 Exhibit 9 represents?
 21 A. This is a graph, which represents spectra
 22 from x-ray fluorescence analysis of particular items. In
 23 this case it's the headliner from the driver's side of
 24 Patrol Car 1180. And what -- what this does is -- x-ray
 14:14 25 fluorescence is a -- a scientific technique that we use to

14:15 1 infers from the absence of something, but certainly in this
 2 case, considering other factors, as well, that -- the
 3 conclusion is that we can't say that any of those items,
 4 whether it be headliner or clothing, was within three feet
 14:15 5 of the discharge of a -- of a firearm.
 6 Q. If someone had stuck a firearm into the car
 7 to shoot Mr. Smith, would you have expected to find those
 8 elements in the materials you tested?
 9 A. Yes, I would expect to find them.
 14:16 10 Q. Let's move on to your conclusions for a few
 11 minutes. And I'd like to focus your attention first on the
 12 events on 5th Street. The plaintiffs in this case I believe
 13 contend that Mr. Smith was trying to drive away from
 14 Detective Cirtella on 5th Street, and the defendants
 14:16 15 contend that Mr. Smith was driving towards Detective
 16 Cirtella on the 5th Street. What does the physical
 17 evidence tell us about what happened at that time?
 18 A. The physical evidence indicates that Patrol
 19 Car 1180 was going toward the position that Officer
 14:17 20 Cirtella had taken at the corner and was going toward and
 21 past him.
 22 Q. And what physical evidence tells us that?
 23 A. There are several factors. One is the
 24 presence of glass on the corner. The glass is from the side
 14:17 25 window. At least it is typical of side-window glass from

14:17 1 the -- from the patrol car. It is tempered glass.
 2 Then also there are two cartridge cases that
 3 were fired through Officer Cirtella's pistol that were
 4 found, one in the vehicle itself, in the front seat of
 14:17 5 the -- of the patrol car, and one found in the windshield
 6 wiper well of the vehicle.
 7 And the other factor are -- involves tire
 8 impressions and tire marks, and the impact between the
 9 patrol car and a parked vehicle, which was a white Jeep.
 14:18 10 **Q. Let's -- let's focus for a moment on the**
 11 **shell casings, one of which was found in the car and one on**
 12 **the -- in the windshield wiper well. Did you test Detective**
 13 **Cirtella's weapon to see how it ejected shell casings?**
 14 A. Yes. I fired the weapon over a flat concrete
 14:18 15 surface so we could understand the characteristic patterns,
 16 if there are characteristic patterns, that result from
 17 firing the same type of ammunition with the same amount of
 18 powder, the same general configuration and design as those
 19 used by the Wilmington Police Department at the time of this
 14:19 20 shooting.
 21 The measurements were taken showing the --
 22 the location that ejected cartridge cases would fall when
 23 discharged from the weapon, and there's a wide variety, as
 24 one would expect, of distances, which were documented and
 14:19 25 put together in a chart.

14:19 1 **Q. Did you use the same kind of ammunition as**
 2 **Detective Cirtella was using that night?**
 3 A. Yes.
 4 **Q. What general conclusions can you reach as to**
 14:19 5 **the pattern of ejection of the shells -- shell casings?**
 6 A. That the particular pistol discharges its
 7 spent cartridge cases slightly backward and to the right,
 8 which is the design of the weapon. Also, depending on the
 9 particular location that the shooter holds the weapon, it's
 14:20 10 possible and it happened several times that the ejected
 11 cartridge casing hit the shooter, and sometimes went higher,
 12 sometimes went lower, but the cartridge cases seemed to spin
 13 and stay in the air for some period of time rather than just
 14 go straight down.
 14:20 15 **Q. What does the fact that there was one of**
 16 **Detective Cirtella's shell casings found in the car tell**
 17 **you?**
 18 A. Well, that tells me given the testing that
 19 we -- we did -- that I did with -- with respect to the
 14:20 20 ejection patterns -- that tells me that within a range of
 21 distances we -- we -- we can put that cartridge case and
 22 its -- the fact that it's a spent cartridge case in
 23 proximity with that squad car, so that in order for that
 24 cartridge case to be in the front seat along the center
 14:21 25 console area of the squad car and the ejected

14:21 1 cartridge case had to be very close to each other in -- in
 2 space and time.
 3 **Q. Would that suggest the direction in which the**
 4 **squad car was driving?**
 14:21 5 A. It -- it would. It would suggest that the
 6 car was moving -- if we're facing at direct -- sideways,
 7 facing the passenger door, that it was moving from -- from
 8 left to right, and that since the pistol ejects cartridge
 9 cases also to the -- to the right and slightly backward and
 14:22 10 upward, that the cartridge case came through the window of
 11 the -- of the squad car while it was still in the air,
 12 meaning that -- that the car was fairly close.
 13 **Q. Does that suggest whether the car was driving**
 14 **toward -- behind Mr. Cirtella?**
 14:22 15 A. I'm sorry. Could --
 16 **Q. Was driving left to right; am I correct?**
 17 A. Yes.
 18 **Q. Was it also moving in a -- towards his rear?**
 19 A. No, it would be moving away, toward --
 14:22 20 **Q. Was the car moving away from Detective**
 21 **Cirtella when he was shooting?**
 22 A. No. It would be coming right up to him.
 23 **Q. Right.**
 24 A. So --
 14:22 25 **Q. I'm sorry.**

14:23 1 A. I'm not sure I understood.
 2 **Q. No.**
 3 **You -- you also made reference to glass.**
 4 A. Yes.
 14:23 5 **Q. I'm going to show you a photograph which you**
 6 **reproduced in part of your report at Page -- supplemental**
 7 **report at Page 4.**
 8 **Would we have the court reporter mark that as**
 9 **I believe Exhibit 9.**
 14:23 10 THE REPORTER: 10, Counsel. 10.
 11 MR. PARKINS: 10. Sorry.
 12 (Deposition Exhibit 10 was marked
 13 for identification.)
 14 MR. PARKINS: Anne, for purposes of the
 14:23 15 record, the only portion of Exhibit 10 is the photograph and
 16 not the accompanying text, and not the report.
 17 **Q. What does this photograph depict, Dr. Nordby?**
 18 A. It shows a police officer pointing to glass
 19 from a tempered glass side window on the corner of 5th and
 14:24 20 Harrison.
 21 **Q. BY MR. PARKINS: Is this the glass to which**
 22 **you earlier referred when you were telling us about the**
 23 **proximity of the motor vehicle?**
 24 A. Yes.
 14:24 25 **Q. Okay. Thank you.**

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14:32 1 **bullets struck anything before hitting Mr. Smith?**
 2 A. Yes.
 3 MS. SULTON: I'm going to object to this
 4 entire line of questioning about any injuries, the cause
 14:32 5 and/or manner of death of Mr. Smith, because Dr. Nordby is
 6 not qualified to render an opinion about physical injuries.
 7 He is not a medical doctor, has no education in the field of
 8 medicine, and is not board certified as a pathologist. So I
 9 will leave that as a continuing objection.
 14:32 10 MR. PARKINS: That's fine.
 11 MS. SULTON: Thank you, Counsel.
 12 MR. PARKINS: Would you like the question
 13 reread?
 14 THE WITNESS: Please.
 14:32 15 MR. PARKINS: Ron, would you do that for me,
 16 please.
 17 (Record read.)
 18 THE WITNESS: Yes. We did a number of --
 19 made a number of observations. The -- one bullet had struck
 14:33 20 the headrest and the other bullet had to go through
 21 Plexiglas in order to reach that area of the -- of the car
 22 occupied by the decedent.
 23 **Q. BY MR. PARKINS: The Plexiglas meaning the**
 24 **barrier between the front and back seats?**
 14:33 25 A. Yes, that's correct.

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14:33 1 **Q. Did the car which -- the bullet which struck**
 2 **the headrest also have to hit the Plexiglas first?**
 3 A. Yes.
 4 **Q. What happens when bullets hit Plexiglas?**
 14:34 5 A. There is a -- in this particular case the --
 6 the jacketed hollow-point ammunition will expand, and it's
 7 designed to expand in -- in size. Also, Plexiglas, in the
 8 experiments that I've done in the past by shooting
 9 ammunition through Plexiglas, indicate that there's a slight
 14:34 10 downward deflection when a projectile strikes that, because
 11 obviously when that projectile is going at a certain rate,
 12 it slows markedly when it strikes the object such as
 13 Plexiglas.
 14 **Q. Do you have an opinion as to whether**
 14:34 15 **Mr. Smith was sitting upright or slumped forward over the**
 16 **steering wheel when he was struck by these two bullets?**
 17 MS. SULTON: I want to again reiterate my
 18 standing objection to any testimony being offered by this
 19 particular witness, because he is not qualified to render
 14:35 20 testimony about the cause or manner of death.
 21 Thank you, Counsel.
 22 THE WITNESS: Repeat.
 23 MR. PARKINS: Would you read it back, please,
 24 Ron.
 14:35 25 (Record read.)

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14:35 1 THE WITNESS: The evidence shows that he was
 2 upright, given the trajectories and the wound path described
 3 by the pathologist.
 4 **Q. BY MR. PARKINS: And what do you mean by the**
 14:35 5 **trajectories?**
 6 A. The trajectories meaning the incoming rounds
 7 through the vehicle, the angles at which all of those
 8 potential bullets had to take in order to reach the occupied
 9 space.
 14:36 10 **Q. Thank you.**
 11 **Let's focus, if we could, on the shot that**
 12 **struck Mr. Smith in the head. Do you have an opinion as to**
 13 **what trajectory that bullet took?**
 14 A. Yes.
 14:36 15 **Q. What trajectory did that take?**
 16 A. Well, the bullet came in from the side. One
 17 has to be cautious in -- in putting together shooting
 18 scenarios in this sense because heads obviously move, but
 19 when we put together the information we have from the squad
 14:36 20 car itself and damage to the vehicle, the bloodstain pattern
 21 evidence which is present inside the vehicle, the medical
 22 examiner's account of the direction of the bullet impact
 23 through the decedent's head, we can come up with a
 24 trajectory, as you put it, that the bullet came from the
 14:37 25 right side or the passenger side of the car, and that the

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14:37 1 decedent was upright in the -- in the vehicle when this
 2 bullet struck his head.
 3 **Q. The plaintiffs have alleged in this case that**
 4 **Mr. -- that the defendant officers shot Mr. Smith after the**
 14:37 5 **police car had come to a stop. Do you have any opinion as**
 6 **to whether the car was still moving when the shot which hit**
 7 **him in the head was fired?**
 8 A. The movement of the vehicle is not something
 9 that is captured by an analysis of an impact of an injury or
 14:38 10 damage to the -- to the vehicle itself. It occurs to me
 11 that we have to consider the -- the scene, as well, the
 12 glass, the fractures of different types of glass, the
 13 striking the Jeep and the movement of the Jeep, as well, and
 14 the fact that for that bullet to have struck the decedent in
 14:38 15 the head, that there had to be a relationship between --
 16 between him and the vehicle. And that's what we can look at
 17 the bloodstain patterns to tell us.
 18 **Q. Is it your understanding that when the car**
 19 **was on Harrison Street it was moving northbound?**
 14:39 20 A. My understanding is that it was moving
 21 northbound.
 22 **Q. Where were Detective Ciritella's shell**
 23 **casings found vis-a-vis the end point of the -- of the trip,**
 24 **the car?**
 14:39 25 A. They were found toward the back end of the

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14:39 1 car, if I'm understanding your question correctly.
 2 Q. Were they found south of the front of the
 3 car?
 4 A. South of the front of the car, that's
 14:39 5 correct.
 6 Q. If the car had been stopped and Detective
 7 Ciritella had fired his weapon, where would you have
 8 expected to find them?
 9 A. I would have expected to find them either in
 14:39 10 the same area as the car or north of the car.
 11 Q. What does the fact that they were found south
 12 of that area tell you?
 13 A. Tells me that the car was moving and
 14 continued to move after those shots were fired.
 14:40 15 Q. Okay.
 16 The plaintiffs in this case allege that
 17 Mr. Smith was slumped over the driving -- over the steering
 18 wheel. The defendants will testify -- or the police
 19 officers will testify that when they arrived at the stopped
 14:40 20 car he was slumped to the right. What does the physical
 21 evidence tell you about what happened?
 22 A. The physical evidence indicates that when the
 23 bullet struck the decedent's head his head was upright, and
 24 we can determine that by looking at the bloodstain patterns
 14:40 25 on the clipboard that are between the passenger and driver's

14:42 1 Have those opinions been expressed to a reasonable degree of
 2 scientific probability?
 3 A. Yes.
 4 MR. PARKINS: Thank you. I have nothing
 14:43 5 further.
 6 Do you want to take a short break?
 7 MS. SULTON: If the doctor would like to.
 8 THE WITNESS: Yeah, short. I'm not feeling
 9 very good.
 14:43 10 MS. SULTON: Off the record.
 11 THE VIDEOGRAPHER: We're going off the
 12 record. The time is 2:43 p.m. Please stand by.
 13 (Short recess.)
 14 THE VIDEOGRAPHER: We're back on the record.
 14:49 15 The time is 2:49 p.m.
 16
 17 EXAMINATION
 18 BY MS. SULTON:
 19 Q. Good morning, Dr. Nord -- or good afternoon,
 14:49 20 I should say.
 21 A. Mm-hmm.
 22 Q. I am reserving all of the objections I've
 23 made prior to the point at which we began your deposition.
 24 I wanted to go through just a couple of
 14:49 25 issues with you, if I may.

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14:41 1 seat in the front seat of the squad car, that allows us to
 2 form a point of origin for those -- for those blood --
 3 bloodstains.
 4 And the second feature is that there's
 14:41 5 projected blood, which can only come from a compromised
 6 artery, for example, and that blood is projected behind and
 7 to the right side of the driver's backrest, and that would
 8 place the decedent slumped to the right at the time those
 9 projected stains struck the partition.
 14:41 10 Q. The plaintiffs in this case allege that
 11 Mr. Smith on 5th Street was trying to drive away from
 12 Detective Ciritella and that Detective Ciritella was never
 13 in danger. The plaintiffs further allege, as I've
 14 mentioned, that the detectives -- the defendants, excuse me,
 14:42 15 shot and wounded Mr. Smith after the car had stopped. The
 16 plaintiffs -- excuse me. The defendants claim that
 17 Mr. Smith narrowly missed Detective Ciritella as he drove in
 18 his direction, he accelerated around the corner, and that
 19 the defendants never fired at the car -- at the car after
 14:42 20 the car was stopped. Which version does the physical
 21 evidence support?
 22 A. The physical evidence clearly supports the
 23 latter version.
 24 Q. You have expressed a number of opinions today
 14:42 25 about the most likely event based on the physical evidence.

14:49 1 Do you know whether or not Mr. Ciritella is
 2 right- or left-handed?
 3 A. No. Not off the top of my head.
 4 Q. When did you look at Patrol Car 1180?
 14:50 5 A. It was in I believe June of 2006.
 6 Q. And this incident occurred September 13th of
 7 2003?
 8 A. That's correct.
 9 Q. Do you have any idea of how many people were
 14:50 10 inside that car before you saw it in the summer of 2006?
 11 A. Just from the photographs that were supplied
 12 to me showing the work that had been done, but -- but -- the
 13 exact number I'm not sure, but I would -- I would venture to
 14 say that several people had been in there.
 14:51 15 Q. When you looked at the car, did you see the
 16 car as it was -- the state of the -- the physical state of
 17 the car as it was on September 13th, 2003, within hours of
 18 the shooting?
 19 A. No one would be in that position unless they
 14:51 20 were at the scene of the shooting and able to look at the
 21 vehicle at that time.
 22 Q. I'm sorry, Doctor. Let me try to sharpen my
 23 question a bit, if I could.
 24 A. Sure.
 14:51 25 Q. When you looked at the car it had already

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE**

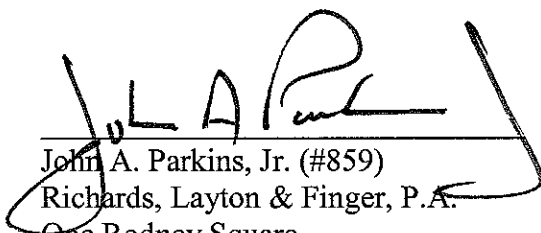
CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2007, I electronically filed the foregoing document with the Clerk of Court using CM/ECF which will send notification of such filing(s) and Hand Delivered to the following:

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I hereby certify that I will send on July 9, 2007, by Electronic Mail, the foregoing document to the following non-registered participants:

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